IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1975

NO. 75-5792

THOMAS LEE KING AND JOSEPH LEE KING, Petitioners

VS.

THE STATE OF NORTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AND AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

Frank Patton Cooke
Commercial Building
Gastonia, North Carolina
28052
(704) 864-4354

Robert H. Forbes
Commercial Building
Gastonia, North Carolina
28052
(704) 864-7281

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	5
Conclusions	10
Appendix	11
EXHIBITS	
Judgment and Opinion of the Supreme Court of North Carolina	19
Order for Stay of Execution	38
Order Extending Time to File Petition for Writ of Certiorari	40

CITATIONS

Cases:

Furman v. Georgia, 408 U.S. 238	2
State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973)	6
State v. Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974)	7
State v. Dawson, 281 N.C. 645, 190 S.E. 2d 196 (1972)	8
State v. Cotton, 218 N.C. 577, 12 S.E. 2d 246 (1940)	8

FRANK PATTON COOKE
ATTORNEY AT LAW
COMMERCIAL BUILDING
GASTONIA, NORTH CAROLINA

IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1975

NO.

THOMAS LEE KING AND JOSEPH LEE KING, Petitioners

VS.

THE STATE OF NORTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered in this proceeding on June 26, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina was rendered and filed on June 26, 1975, bearing Opinion Number 8 and reported in 215 S.E.2d 540. A copy of the opinion is hereto attached and made a part of this Petition.

JURISDICTION

The opinion of the Supreme Court of North Carolina above referred to was entered and certified in the Superior Court of Gaston County, North Carolina, on July 7, 1975, and an Order for Stay of Execution was entered on July 10, 1975, and executed by the Honorable Susie Sharp, Chief Justice of the Supreme Court of North Carolina, which Stay of Execution is hereto attached and made a part of this Petition. The Stay of Execution was granted pending the determination of this Petition for Writ of Certiorari to the United States Supreme Court.

FRANK PATTON COOKE
ATTORNEY AT LAW
COMMERCIAL BUILDING
GASTONIA, NORTH CAROLINA

An Application for Extension of Time Within Which to File a Petition for Writ of Certiorari was filed in the United States Supreme Court, and an Order granting this extension of time was executed by the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States, on September 26, 1975, which Order is hereto attached and made a part of this Petition.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Have the petitioners been deprived of their constitutional right to be free from the infliction of cruel and unusual punishments, in violation of the Eighth Amendment to the Constitution of the United States by virtue of the Supreme Court of North Carolina's interpretation of §14-17 of the North Carolina General Statutes after the decision of the Supreme Court of the United States in the case of Furman v. Georgia, 408 U.S. 238?

2. Have the petitioners been deprived of their constitutional right to be free from the infliction of cruel and unusual punishments, in violation of the Eighth Amendment to the Constitution of the United States by virtue of their being sentenced to death under the North Carolina General Statutes §14-17?

3. Have the petitioners been deprived of their constitutional right of due process of law, in violation of the Fifth Amendment of the Constitution of the United States by virtue of the consolidation for trial of the charges against petitioner Thomas Lee King with those against Joseph Lee King?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eighth Amendment to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury,

FRANK PATTON COOKE
ATTORNEY AT LAW
COMMERCIAL BUILDING
GASTONIA, NORTH CAROLINA

except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

1. The North Carolina General Statutes §14-17 prior to its amendment, which was effective April 8, 1974:

> Murder in the first and second degree defined; punishment - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison and the Court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

2. The North Carolina General Statutes §15-152: (1965)

> Separate counts; consolidation. - When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated: Provided, that in such consolidating cases the defendant shall be taxed the solicitor's full fee for the first count, and a half fee for only one subsequent count upon which conviction is had or plea of guilty entered: Provided, this section shall not be construed to reduce the punishment or penalty for such offense or offenses.

FRANK PATTON COOKE
ATTORNEY AT LAW
COMMERCIAL BUILDING
GASTONIA, NORTH CAROLINA

STATEMENT OF THE CASE

The petitioners, Thomas Lee King and Joseph Lee King, were tried before the Honorable Fred Hasty and a jury at the July 15, 1974, criminal session of the Gaston County Superior Court Division of the General Court of Justice for the Twenty-Seventh Judicial District of North Carolina, upon indictments charging each of them with robbery with a dangerous weapon and first degree murder of Leo Davis, both offenses occurring on or about the 16th day of February, 1974. The petitioners, and each of them, entered a plea of not guilty to each charge. The jury on the 31st day of July, 1974, returned verdicts of guilty in all four cases. The Court sentenced both defendants to death by the inhalation of lethal gas in the case against them charging them with first degree murder, and imposed no judgment in the cases of armed robbery. Both defendants gave notice of appeal and the Supreme Court of North Carolina upheld the convictions. Both the State and the petitioner Thomas Lee King presented evidence in the case and the record of the trial in two volumes consists of 621 pages.

Prior to the trial on July 15, 1974, an Order was signed by the Honorable William T. Grist during the June 13, 1974, session of the Gaston County Superior Court Division of the General Court of Justice for the Twenty-Seventh Judicial District regarding the release of the petitioners on bail. (R 26, 27). Both of the petitioners were denied release on bond, but in this Order Judge Grist stated, "That the State has indicated that [they] will probably not proceed in both cases at the same term and counsel for the defendant Joe King, Mr. Robert H. Forbes, has indicated he would likewise move that the matters not be consolidated for trial". (R 27). Upon this premise, the defense attorneys for the petitioners prepared their separate defenses. On July 15, 1974, after arraignment and after plea, Judge Hasty ordered that the petitioners, Thomas Lee King and Joseph Lee King, would be tried together. A Motion had been filed by Attorney Robert H. Forbes on behalf of Joseph Lee King for a severance of the trials. (R 28, 29). This Motion was denied and the

FRANK PATTON COOKE
ATTORNEY AT LAW
COMMERCIAL BUILDING
GASTONIA, NORTH CAROLINA

State proceeded with the trial of all four cases during the July 15, 1974, session of Superior Court.

The evidence presented by the State and by the petitioners is summarized in the attached Opinion handed down by the Supreme Court of the State of North Carolina on June 26, 1975. After the close of the evidence, guilty verdicts were returned against both petitioners. The attorneys for both of the petitioners each made motions to set the verdicts aside and motions for mistrials based in part on the fact that the two cases were consolidated for trial over the objections of both defendants. These motions were denied. (R 574, 575).

Notices of intention to appeal from the verdicts and rulings of the Trial Judge were served on the State of North Carolina on the 1st day of August, 1974. (R 43, 44). Both petitioners were allowed to appeal to the Supreme Court of the State of North Carolina as indigents. The petitioners are still in an indigent state and respectfully move the Supreme Court of the United States to accept this Petition in that form, and in support of this the petitioners attach a written Motion and an Affidavit of Indigency pursuant to Rule 53 of the Supreme Court Rules.

The petitioners' convictions and each sentences were affirmed by the Supreme Court of the State of North Carolina in an Opinion filed on June 26, 1975, with three of the justices dissenting as to the death penalty.

REASONS FOR GRANTING THE WRIT

It is submitted that the Supreme Court of North Carolina has decided constitutional questions in this case contrary to the Constitution of the United States and contrary to the applicable decisions of this Court which deny the petitioners fundamental constitutional rights to due process and freedom from the infliction of cruel and unusual punishment. In particular, the North Carolina Supreme Court's ruling in this case misapplies this Court's holding

FRANK PATTON COOKE
ATTORNEY AT LAW
COMMERCIAL BUILDING
GASTONIA, NORTH CAROLINA

in the case of Furman v. Georgia, 408 U.S. 238 (1972) and further imposes the death penalty which, it is submitted, is proscribed by the Eight Amendment to the United States Constitution. The constitutional questions raised in this case are of broad and fundamental importance, not only to the petitioners themselves, but to others similarly situated who have had to or will be required to stand trial for capital offenses, and most particularly to those versus North Carolina required to stand trial for capital offenses subsequent to the Furman decision of this Court and its interpretation in North Carolina.

In the case of State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973), the Supreme Court of North Carolina was required to apply the principles of Furman v. Georgia to the North Carolina Capital Crime Statute, in this case more particularly North Carolina General Statute §14-17. In its decision a bare majority of the seven member Court interpreted Furman to invalidate the portion of the statute which enabled the jury to fix punishment at life imprisonment in its discretion. As a result of this decision, the North Carolina Supreme Court interpreted the statute to provide unconditionally for punishment by death upon conviction of the crime.

At the time the Waddell decision was rendered, the North Carolina General Assembly had not modified the existing statute, North Carolina General Statute §14-17, but subsequent to the decision in Waddell and other cases following Waddell, the North Carolina General Statutes were amended by the legislature effective April 8, 1974, to eliminate that portion of North Carolina General Statute §14-17 enabling the jury in its discretion to fix punishment as life imprisonment. Between the date of the legislative enactment and the decision in Waddell which was rendered on January 18, 1973, numerous cases were decided and in particular your petitioners' cases were decided. The crimes for which your petitioners were convicted occurred on or about the 16th day of February, 1974, a date prior to the modification by the North Carolina legislature.

FRANK PATTON COOKE
ATTORNEY AT LAW
COMMERCIAL BUILDING
GASTONIA, NORTH CAROLINA

Your petitioners contend that the North Carolina Supreme Court's interpretation of the Furman decision is erroneous. It is submitted that, as pointed out by Chief Justice Bobbitt of the North Carolina Supreme Court in a later dissenting opinion in State v. Jarrette, 284 N.C. 625; 202 S.E. 2d 721 (1974), "the impact of Furman upon our statutes is to prohibit, not to require to permit the imposition of the death sentences until such time as our statutes are amended by the General Assembly" (at 748). In the Jarrette case Chief Justice Bobbitt argued, for a three member minority, again quoting his dissent in the Waddell case, saying:

> I do not think any death sentence may be constitutionally inflicted unless our General Assembly strikes from our present statute the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment. In my opinion this Court has no right to ignore, delete or repeal these provisions which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death sentence was permissible. Furman did not repeal them. This Court has no right to repeal them. (at 31).

The petitioners contend that the only proper course for the North Carolina Supreme Court and its only proper interpretation of Furman would have been to forbid the imposition and execution of the death penalty and to follow a policy of judicial restraint. It is the responsibility of the legislature and not the State Supreme Court to establish a scheme of sanctions for criminal acts, but the interpretation given in Waddell by the bare majority, which interpretation was followed in this case, did in fact establish a scheme for sanctions for criminal acts. As the Opinion of the North Carolina Supreme Court in the instant case stated, the only permissible course for the North Carolina Court to take in this cause would have been to vacate the death sentences in the petitioners' cases and to remand for pronouncement of judgments of life imprisonment.

The petitioners further contend that their rights under the Fifth Amendment of the Constitution of the United States to due process of law were

FRANK PATTON COOKE
ATTORNEY AT LAW
COMMERCIAL BUILDING
GASTONIA, NORTH CAROLINA

violated, in that the Trial Court consolidated the cases for trial against both of the petitioners. Under §15-152 of the General Statutes of North Carolina the consolidation for trial of two defendants charged with the same offenses is not expressly authorized, but unquestionably this statute has been interpreted many times to permit such consolidation. However, it has been repeatedly held that the matter of consolidation or severance is a discretionary matter for the Trial Court. State v. Dawson, 281 N.C. 645, 190 S.E. 2d 196 (1972). This discretion should not be an unbridled one and the United States Supreme Court held in the case of Bruton v. United States, 391 U.S. 123, that this consolidation practice is limited in the area where one defendant has made inculpatory statements of the other. The North Carolina Courts have seemed to recognize the need for separate trials where the defenses of the defendants charges are antagonistic to each other. State v. Cotton, 218 N.C. 577, 12 S.E. 2d 246 (1940). Although language to this effect does not appear in any of the decisions noted by the petitioners, they contend that it would not be an improper statement of the rules to conclude that although consolidation or severance is a discretionary matter for the Trial Court, discretion should be exercised in favor of severance under circumstances in which each defendant may have a fair trial only if he be tried alone. The petitioners assert that in the instant case fundamental fairness required that they should have been granted a trial separate and apart from each other. It was the understanding of the petitioners that in the case at hand they were to be tried on separate occasions and the wording of the Order entered at the bail hearing on June 13, 1974, and signed by the Honorable Judge William T. Grist, who presided over the June, 1974, criminal session of the Superior Court for Gaston County, North Carolina, (R 27) seemed to indicate that the State would be required to elect as to which case would be tried first and that case would be placed on the calendar for trial in Gaston County during the July 15, 1974, term. Both of the petitioners

FRANK PATTON COOKE
ATTORNEY AT LAW
COMMERCIAL BUILDING
GASTONIA, NORTH CAROLINA

based their defenses on the fact that the cases were to be severed for trial. The petitioners contended to the North Carolina Supreme Court that the Order of the Honorable Judge Fred Hasty consolidating for trial the cases of the petitioners amounted to an overruling of an Order of another Superior Court Judge, which in and of itself constitutes prejudicial error. The Supreme Court of North Carolina did not rule in favor of this premise. Because the cases were consolidated for trial a great deal of prejudice existed to both of the petitioners throughout; for example, the repetition of the name King during the trial, whether referring to Joseph or Thomas Lee, must have had a cumulative effect upon the jury. Furthermore, the fact that the petitioners were father and son must have tied the two together in the minds of the jury to some extent. There were a number of more concrete matters resulting in prejudice to the petitioners connected with consolidation. The petitioner Thomas Lee King contends that he was prejudiced by the identification by one of the witnesses of Joseph King because of the tattoos on his hand, as well as the clothing he wore. Further, there was evidence admitted against Joseph King concerning blood type stains on his clothing which would not have been admissible as evidence against Thomas King in a separate trial. Also, there was evidence admitted against Thomas Lee King that could have had a prejudicial effect on the jury against his father, Joseph King; for example, the State contended that fingerprints found in the home of the deceased belonged to the petitioner Thomas Lee King. This evidence would not have been admissible against Joseph Lee King had he been tried separately and certainly could not have prejudiced the jury's minds against him had it not been admitted. In a sense, the defenses of the two petitioners were antagonistic to each other. Obviously, attorneys for both of the petitioners thought so and they depended on the fact that the trial would be held separately in preparation of their cases. The petitioner Thomas Lee King contends that he was damaged in his defense of the charges against him by the failure of his father, the co-petitioner, to

FRANK PATTON COOKE
ATTORNEY AT LAW
COMMERCIAL BUILDING
GASTONIA, NORTH CAROLINA

take the witness stand and deny the charges against him. Although the North Carolina Supreme Court has held that this factor alone is not sufficient to entitle a defendant to a new trial, in the instant case, however, taken into consideration with all of the other factors as set forth above, it prevented the petitioner Thomas Lee King from having a fair trial.

As a final argument, the petitioners contend that their Eighth Admendment rights to be free from the infliction of cruel and unusual punishment were violated by the State of North Carolina imposing the death penalty upon them. Although Furman v. Georgia does not specifically hold that capital punishment is prohibited by the Eight Amendment, Justice Brennan in his opinion filed in the Furman case points out that "no other existing punishment is comparable to death in terms of physical and mental suffering". (at 288). It is agreed by all of the justices in the opinions filed in Furman that in order to determine whether or not a punishment would be cruel and unusual within the meaning of the Eighth Amendment itself must be analyzed, keeping in mind the standards of decency and human respect in the present society. The petitioners contend that in this society there is no place for capital punishment because it is excessive and also because it is offensive to the moral standards that exist in this society. For these reasons no state through its legislative process should be allowed to inflict a death penalty upon someone as punishment for committing a crime because this would be contradictory to the principles propounded in the Eighth Amendment under an interpretation that should be given the Eighth Amendment by today's standards.

CONCLUSION

For the foregoing reasons, the petitioners pray that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

CERTIFICATE

I HEREBY CERTIFY THAT I HAVE FILING THE FOREGOING PLEADINGS [illegible] THIS DAY [illegible] BY DEPOSITING A COPY OF [illegible] POSTAGE PREPAID AND ADDRESSED TO OPPOSITE [illegible]

This the 20th day of Nov., 1975.

FRANK PATTON COOKE
ATTORNEY AT LAW
COMMERCIAL BUILDING
GASTONIA, NORTH CAROLINA

FRANK PATTON COOKE
BY: Frank P. Cooke & Robert H. Forbes
ATTORNEY FOR Petitioners

/s/ Frank Patton Cooke
Frank Patton Cooke
Commercial Building
Gastonia, North Carolina 28052
(704) 864-4354

/s/ Robert H. Forbes
Robert H. Forbes
Commercial Building
Gastonia, North Carolina 28052
(704) 864-7281

common jail of Gaston County without the benefit of bond, charged with the murder of Leo Davis and with the armed robbery of the said Leo Davis, alleged to have occurred on February 16, 1974. That your petitioner is not guilty;

(3) That your petitioner has been lodged in the common jail of Gaston County since February 20, 1974, without the benefit of bail. That these cases were scheduled for trial on June 10, 1974, but were continued by the State for reasons unknown to your petitioner;

WHEREFORE, your petitioner respectfully moves the Court that a reasonable bail bond be allowed in the fair administration of justice, and for such other and further relief as to the Court may seem just and proper.

s/ FRANK P. COOKE
Attorney for the Defendant

(Verified by THOMAS LEE KING this the 11th day of June, 1974.)

ORDER RE: BAIL (BOTH DEFENDANTS)

THIS MATTER coming on to be heard and being heard before the undersigned judge presiding over the June 10, 1974 Criminal Session of Superior Court for Gaston County upon a motion of the defendants, Thomas Lee King and Joe King, through their attorneys, Frank P. Cooke, and Robert H. Forbes, respectively, for the purpose of considering a bond for the defendants who are charged with First Degree Murder and Armed Robbery.

The Court having considered the matter for some three hours and having heard a number of witnesses both for the defendants and the State, is of the opinion that the motion for allowance of a bond as to each of the defendants should be and the same is hereby DENIED.

That the matter is ordered held for further consideration in the event that the cases are unable to be heard as hereafter set forth.

That the State has indicated that there will probably not proceed in both cases at the same term and counsel for the defendant, Joe King, Mr. Robert H. Forbes, has indicated he would likewise move that the matters not be consolidated for trial.

It further appearing to the Court that the cases were calendared for trial during the week of June 10, 1974, and that the defendants were ready for trial and that it became necessary that the State move for a continuance because of the absence of private prosecution, Mr. Grady B. Stott, and the Court having considered the motion for a bond as a further motion for a speedy trial;

THE COURT ORDERS that the State be required to elect as to which case it desires to try and that said case be placed on the calendar for trial in Gaston County on July 15, 1974.

(That counsel for both defendants have indicated in open Court that they are ready for trial and do not perceive at this time any motions which they contemplate filing which would delay the trial of the cases.)

IT IS FURTHER ORDERED that a copy of this order be sent to counsel for the defendants, Frank P. Cooke and Robert H. Forbes; and to the Solicitor for the State.

IT IS FURTHER ORDERED that a Transcript of this hearing be prepared (original and one copy) at State expense.

This the 13th day of June, 1974.

s/ WILLIAM T. GRIST
Judge Presiding

ORDER OF GRIST, J. (THOMAS LEE KING) (Filed July 25, 1974)

THIS CAUSE coming on to be heard and being heard before the undersigned Regular Judge assigned to hold the Courts of the 27th Judicial District, upon motion of the defendant, through his attorney, Frank P. Cooke, that the defendant be permitted to accompany the attorney to various places to assist counsel in the preparation of his defense;

And it further appearing to the Court that the defendant is confined in the common jail of Gaston County, without bond;

And it further appearing to the Court that it would be in the fair administration of justice that the defendant be permitted to accompany counsel or his agent at various times and places, in order to prepare his defense;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Sheriff of Gaston County be, and he is hereby ordered, to permit the defendant to accompany his attorney, or the attorney's agent, to such places at such times as the attorney, Frank P. Cooke, may request; provided that at all times the Sheriff or his deputy shall remain with and keep the defendant in custody during such times that he accompanies his attorney or the agent of the attorney.

This the 25th day of June, 1974.

s/ WILLIAM T. GRIST
Judge Presiding

MOTION (JOSEPH LEE KING) (Filed July 9, 1974)

NOW COMES the defendant, Joseph Lee King, through his attorney, Robert H. Forbes, and respectfully moves the court in the above captioned matter for an Order granting the de-

fendant, Joseph Lee King, a severance from all other defendants in the above captioned cases on the grounds that the defendants, Joseph Lee King and Thomas Lee King would be prejudiced by the joinder, both of offenses and defendants, in the above captioned matter.

After reviewing all of the evidence which has been submitted to the defendant's attorney by the State and after reviewing all the transcript of the hearing held in Superior Court on June 13, 1974, counsel is of the opinion that this defendant could not receive a fair trial if he is required to go to trial in these cases against him with the co-defendant, Thomas Lee King, as certain evidence for the State against Thomas Lee King would be prejudicial to the defendant, Joseph Lee King and the defendant's counsel is informed and believes, and therefore alleges that the defense of each of the defendants would be different and each defense could prejudice the other defendant.

Because of the nature of the cases pending against the defendant, the complexity of the cases, defendant alleges that the right to have his case judged separately would be seriously prejudiced if the cases were tried together.

For the foregoing reasons, counsel believes that in the interest of justice, there should be a severance of these cases from the cases against the co-defendant, Thomas Lee King.

WHEREFORE, the defendant, through his counsel, respectfully requests that such severance for which no previous application has been made, be granted.

This the 9 day of July, 1974.

s/ ROBERT H. FORBES
Attorney for Defendant

THE CLERK: Edwin Miller Your foreman has reported to the Court a verdict of guilty of murder in the first degree in Case No. 74 CR 4358 as to the defendant, Joseph King. Was this your verdict?

JUROR: Yes.

THE CLERK: Is this now your verdict?

JUROR: Yes.

THE CLERK: Do you still agree and assent thereto?

JUROR: Yes.

THE CLERK: You have found the defendant, Joseph King, guilty of murder in the first degree. This is your verdict, so say you all.

JURORS: Yes. (in unison)

THE COURT: You say your client wants to say something, Mr. Cooke.

MR. COOKE: I want to make a motion. If it please the Court, the defendant moves to set aside the verdicts of the jury in both cases; the robbery with a dangerous weapon and the murder charge. He also makes motions for mistrials in each case for errors committed during the course of the trial. In support of his motions to set aside the verdict, may it please the Court, the defendant contends that he did not get a fair trial based upon the fact that these two cases were consolidated for trial over the objections of the defendant. I think there can be no question, at least in my mind, that this defendant saddled with the co-defendant, Joe King, had an insurmountable burden to carry. Of course, I am aware of the present rulings of our highest Court with regard to discretionary power of His Honor in consolidating the cases for trial. However, as it was argued before the consolidation and on the motion against consolidation, this defendant plead not guilty, but he offered no evidence. (Mr. Cooke continues to argue motion.)

MR. FORBES: If it please the Court, on behalf of the defendant, Joseph King, we would make the same motion on principally the same grounds. I would just like to say this. Your Honor recalls prior to the commencement of this trial, on behalf of Joseph King, we asked for a separate trial because at that time we were well aware of the evidence involved in this case and well aware that there were two separate defenses involved in trying to defend these two defendants and that the defense, by combining the two of them, during the course of the trial, would in effect work against each other. (Mr. Forbes continues to argue motion.) We argue and contend that the defendant, Joe King, is entitled to a declaration by the Court of a mistrial principally on the basis that there was a consolidation of the cases, rather than a separate trial.

MR. COOKE: We also move that the charge of robbery with a dangerous weapon be arrested and the verdict be set aside and cite to His Honor State vs. Carroll and Stewart decided by the Supreme Court of North Carolina on December 13, 1972, and contained in Volume 282 at Page 326. The Supreme Court held that where a defendant is convicted of both the robbery and the murder that the lesser merges into the greater.

THE COURT: Each of the motions of the defendants are OVERRULED or DENIED.
DEFENDANT THOMAS LEE KING'S EXCEPTION NO. 129.

DEFENDANT JOSEPH KING'S EXCEPTION NO. 111.

MR. COOKE: Does that include the argument under the State vs. Carroll?
THE COURT: I'll take that into consideration in my judgments.

THE COURT: Now, in the first case, 74 CR 4357, Thomas Lee King, please stand. (Defendant Thomas Lee King stands.)

same time the jury in case No. 74CR4358 returned a verdict of guilty of murder in the first degree.

It appears to the Court that the commission of the robbery with a dangerous weapon was an essential element in the State's proof of murder in the first degree under the felony-murder doctrine and became a part of and was merged into the murder charge.

The Court, therefore, determines that no judgment may be entered in this case imposing punishment.

IT IS SO ORDERED.

This 1st day of August, 1974.

s/ FRED H. HASTY
Judge Presiding at the July 15, 1974 Criminal Session Extended

Recvd - Ernest D. McClude D/S 8/1/74

APPEAL ENTRIES (THOMAS LEE KING)

In apt time, the defendant objects and excepts to the rulings and the foregoing attached judgment of the Court and gives notice of appeal to the Supreme Court of North Carolina.

Further Notice waived.

The defendant is allowed 90 days to prepare and serve case on appeal, and the State is allowed 30 days after such service to prepare and serve countercase.

~~Appeal bond is set at~~ Defendant having been found indigent no appeal bond required.

This the 1 day of Aug 1974.

s/ FRED H. HASTY
Presiding Judge

APPEAL ENTRIES (JOSEPH KING)

In apt time, the defendant objects and excepts to the rulings and the foregoing attached judgment of the court and gives Notice of Appeal to the Supreme Court of North Carolina.

Further Notice waived.

The defendant is allowed 90 days to prepare and serve case on appeal, and the State is allowed 30 days after such service to prepare and serve countercase.

Appeal bond is set at $ Indigent - No bond required.

This the 1 day of Aug, 19__.

s/ FRED H. HASTY
Presiding Judge

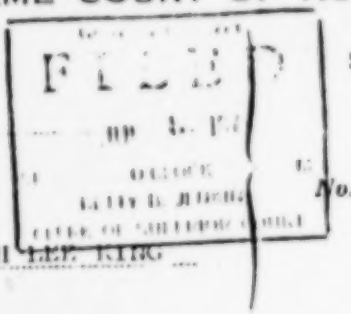
MOTION TO ENLARGE TIME FOR DOCKETING RECORD ON APPEAL AND TO PREPARE AND SERVE CASE ON APPEAL (THOMAS LEE KING) (Filed Oct 29, 1974)

TO THE HONORABLE FRED H. HASTY, JUDGE OF THE SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE FOR GASTON COUNTY, GREETING:

NOW COMES the defendant and respectfully moves the Court that time be extended or enlarged within which to docket the Record on Appeal and to prepare and serve the Case on Appeal, and in support of these motions shows unto the Court the following:

(1) That the defendant was tried and convicted at the July 15, 1974, Criminal Session

SUPREME COURT OF NORTH CAROLINA



Spring TERM, 19 75

TE OF NORTH CAROLINA

vs. No. 11 Gaston County.

MAS LEE KING and JOSEPH LEE KING

is cause came on to be argued upon the transcript of the record from the Superior Court Gaston *County:*

nsideration whereof, this Court is of opinion that there is no *error in the record and proceedings of said Superior Court.*

s therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the

ble DAN K. MOORE *Justice, be certified to the said Superior Court, to the intent that fu*

CEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINI

is considered and adjudged further, that the DEFENDANTS DO PAY

the costs of the appeal in this Court incurred, to wit, the sum of

****FORTY-TWO AND 00/100**** *dollars (*$ 42.00 *).*

cution issue therefor. Certified to Superior Court this 7th *day of* July *19* 75.

E COPY

ADRIAN J. NEWTON
Clerk of the Supreme Court.

By: _____
Deputy Clerk

al Printing Co., Raleigh, N. C.

STATE OF NORTH CAROLINA

v. No. 8 - Gaston

THOMAS LEE KING and
JOSEPH KING

Appeal by defendants pursuant to G.S. 7A-27(a) from Canty, J., at the 15 July 1974 Session of Gaston Superior Court.

On indictments proper in form, defendants were convicted of robbery with a dangerous weapon and first degree murder. The trial judge ruled that the act of robbery with a dangerous weapon was an essential element of the State's proof of murder in the first degree and that the robbery charges merged into the murder charges. Judgments imposing the death penalty as to each defendant were entered on the first degree murder convictions.

The trial of these cases began on 15 July 1974 and ended on 31 July 1974. The record of the trial, in two volumes, consists of 621 pages. For this reason our summary of the evidence, in order to be fair to both the State and defendants, of necessity is given in some detail.

The State's evidence is summarized as follows: On Saturday night, 16 February 1974, Mr. Leo Davis, age 72, and his wife Missouri Davis, age 65, were living in their five-room brick home at 402 North Pine Street in Gastonia where they had lived for thirty-three years. They retired for the evening about 9:00 p.m. At approximately 11:00 or 11:30 p.m., the doorbell rang and Mr. Davis went to the door and opened it. Mrs. Davis followed her husband to the door because she knew he did not see well. The two defendants entered through the opened door and Thomas King told Mr. Davis, who bought and sold guns, that he wanted to see one of his rifles. Joseph King, father of Thomas King, took a seat in the den on a couch about two or three

feet from where Mrs. Davis was sitting in a chair. Thomas looked at the rifle and then gave it back to Mr. Davis. As Mr. Davis turned to replace the rifle on the rack, Thomas "reached in his pocket and got something and hit [Mr. Davis] in the head with it." Mrs. Davis then hit Thomas in the back with her fist, saying, "Don't you hit him like that." At that point, Joseph hit Mrs. Davis from behind with a hammer and "chint the top of [her] head off." Mrs. Davis observed Thomas place his hands around her husband's neck as Joseph dragged her into the bedroom, pushed her onto the floor, hit her with the hammer, and stabbed her five times in the chest. When Joseph dropped the hammer, she picked it up and hit him several times with it. Soon thereafter, Thomas entered and demanded money, and Mrs. Davis opened the safe in the bedroom for them. Finding no money there, defendants again demanded money, whereupon she gave them $18 from her pocketbook. Defendants then tied Mrs. Davis with a sheet, cut the cord to the telephone, and left. When Mrs. Davis untied herself, she saw her husband's lifeless body lying in the den. She then went to a neighbor's and called the police. She was taken by ambulance to Gaston Memorial Hospital and soon after to Charlotte Memorial Hospital where she remained for approximately two weeks.

Mrs. Davis further testified that a metal box containing over $300 in half-dollars and quarters was missing from her safe after the robbery. She did not see anyone remove the box from the safe but she had seen it there when she opened the safe. Thomas was wearing a white shirt with light blue pants and Joseph was wearing dark clothes and a yarn cap on the night in question. The face of neither was covered in any way. Mrs. Davis noticed a scar or laceration on Thomas's lip. When the two men entered her home on the night of 16 February 1974, she was of the opinion, judging from the tone of the conversation, that her husband knew these men. She later remembered Joseph from his having lived in that neighborhood ten to twelve years

earlier, although she had not known Thomas during that period.

Mrs. Davis selected the pictures of both defendants from photographic lineups as being the men who had committed these crimes.

Donald Robinson, a driver employed by Yellow Cab Company, received a call about 1:00 a.m. on 17 February 1974 to go to Circle View Drive in Gastonia. There he picked up the two defendants. Thomas entered the front seat and Joseph entered the back seat. Thomas was wearing light blue pants and a dark blue "ureso-type" coat. The pants had a heavy stain on the right leg. Joseph's face and head were scratched and bloody. They told Robinson "something about being in a motor cade and [getting] in a fight." Thomas referred to Joseph as "something like 'Pappy'." Robinson let them out at Houser's Supermarket on the corner of Wilkinson Boulevard and West Club Circle about three miles from where he picked them up. Thomas paid the $1.75 fare in coins, "mostly quarters."

Mrs. Brenda Lourance testified that between 12:40 and 12:50 a.m. on 17 February 1974, defendant Thomas King came to her door on Circle View Drive in Gastonia and asked to use a telephone to call a cab. Thereupon, Mrs. Lourance called a cab for him. Mrs. Lourance lives about three-fourths of a mile from the Davis residence.

Charles Peffner of the Gastonia Police Department testified that while investigating this case in the early afternoon of 17 February, he found a hammer under a large truck 385 feet from the Davis residence. The residence itself was in general disarray, and there were brownish red stains throughout.

Marvin Barlow of the Gastonia Police Department testified that a small metal box was found at the Davis residence immediately outside the bedroom door. From this box three latent fingerprints were lifted and these were later identified by expert witnesses as belonging to Thomas King.

At about 7:30 a.m. on 17 February 1974, Gastonia police officers arrested Joseph King at his home at 130 West Club Circle

Driv. During a lawful search of the premises, officers discovered on the living room couch a dirty blue jacket that had stains on the left shoulder.

Miss Laura Ward, a forensic serologist with the State Bureau of Investigation, testified that tests made on the coat found at Joseph King's residence on 19 February 1974 revealed the presence of human blood stains. Some of these stains were group "O" and some were group "A". An examination of the hammer in evidence revealed human blood stains of group "O". Miss Ward tested Joseph's blood and found it to be group "A". Mrs. Davis's blood was found to be group "O".

There was medical testimony to the effect that Leo Davis died as a result of asphyxiation due to manual strangulation.

Defendants' evidence is summarized as follows: When Joseph King was arrested on the morning of 19 February, it appeared to officers he had not shaved for several days. Joseph was cooperative with officers, and explained to them that scratches and a bruise on his head were caused when he hit his head on a rusty nail in the basement of his house. He further told officers that although he knew Mr. Davis he had not seen him since he moved ten years ago from the neighborhood where the Davises live. Joseph King did not testify at trial.

Defendant Thomas King testified that he was 23 years old and that he knew Mr. and Mrs. Davis because as a teenager he did yard work for them over a period of about two years. At about 2:30 or 3:00 p.m. on 18 February 1974, he went to Charlotte with a friend named Donald Bridges to shoot pool at a place called Smitty's. He was wearing a dark blue jacket and burgundy pants and at no time that night was he wearing blue pants. He left Smitty's about 8:00 or 8:30 p.m. and returned home to Cantonia. He went to the home of his in-laws because he was unable to get heating oil for his house. There,

he had a late supper and made arrangements to have his wife and children stay there for the night. He called his parents' home to arrange to sleep there for the night because there was not enough room for him at the home of his in-laws. When he called there, his father Joseph King was intoxicated. He then left to go a couple of blocks to a package store to get a six-pack of beer. He planned to catch a ride from there to his parents' house. While thumbing a ride to the package store, he caught a ride with a man who said he was going to Charlotte to shoot pool. Thomas decided to go to Charlotte with this man, and was let out at the Little Rock Cue Lounge in Charlotte between 10:00 and 10:30 p.m. There he saw a waitress named Debbie, Jeff Anderson, Lindsey Caldwell, and a girl whose nickname was "Sam." Of these, only "Sam" testified at trial. He shot pool at the Little Rock Cue Lounge until 12:00 or 12:15 a.m. At that point, he caught a ride with a man named Bill Patrick whom he had never seen before. Bill Patrick did not testify at trial.

Upon entering Gastonia, Bill Patrick's 1969 Chevelle had a flat tire. This occurred about 12:45 or 1:00 a.m. Patrick did not have a spare tire so he and Thomas walked to the Lowrance residence nearby, knocked on the door, and asked the lady who answered the door to call a cab for them. Thomas told Patrick to come with him to his father's house and they would make arrangements for Patrick's car. Thomas told the cab driver to stop at Hauser's Superette because he wanted to make a purchase. There, he and Bill Patrick left the cab and he paid the driver $1.75 with quarters he had gotten at the pool hall. There was no blood on the clothing of either defendant or Bill Patrick. Bill Patrick went to a pay phone booth and defendant went inside the superette and purchased a fifth of wine. After buying the wine, defendant and Bill Patrick parted and defendant walked the short distance to his parents' house. He entered the house about 1:10 or 1:20 a.m. and observed his father "passed out" on the couch

in the living room. Thomas continued to the bedroom, got into bed, and began to read. His father awoke and entered the bedroom, and he and Thomas began struggling for the wine. Joseph, who was intoxicated, hit Thomas in the nose and Thomas retaliated with blows to the face which caused Joseph to hit his head on the door facing. Thomas then gave his father the bottle of wine and his father returned to the couch.

Thomas further testified that he was employed in the business of selling baby pictures and had been so employed for more than four years. His income for 1973 was between $10,000 and $11,000. He denied going to the Davis residence on 16 February 1974 and denied that he ever had a scar or any sort of laceration on his lip. He further denied that he changed clothes on 16 February 1974 or that he had blood on his trousers at any time during that period. Thomas stated that he has never referred to his father as "Pappy" or "Pop" in his life. He also denied that the fingerprints found on the metal box were his.

Ronald Lee Bridges testified that on the afternoon of 16 February 1974 he and Thomas shot pool together at Smitty's in Charlotte until about 8:00 or 8:15 p.m. Defendant had on deep red pants at that time.

David Timothy Messick testified that Thomas King's general reputation is good. He and Thomas cleaned up the Davis yard together on one occasion when they were younger. On cross-examination, Messick testified that the two boys were twelve or thirteen years of age when they did this.

Jimmy Johnson testified that he saw Thomas King and another boy cut the Davis yard on several occasions when Thomas was about sixteen years of age.

Eight witnesses, including Thomas's employer, testified that Thomas's character and general reputation were good.

Alvin Leon Carr testified that about 10:00 p.m. on a Saturday about five or six months ago he saw Thomas at the Little Rock Cue Lounge. Carr did not remember the date or anything about what Thomas was wearing at the time. He did not see a woman named "Sam" shooting pool.

Samantha Elizabeth McAnulty (Sam) testified that she saw Thomas at the Little Rock Cue Lounge on 16 February 1974. She remembered what she was doing on 16 February because that is her birthday. Thomas was still there at 12:30 a.m. On cross-examination, she testified that she could not swear that she had ever seen Thomas before that date, that she does not remember with whom he was playing, and that she does not know anyone named Bill Patrick.

Mrs. Ollie Lewis testified that she is the mother-in-law of Thomas King and that he was wearing burgundy pants and a dark blue coat on the night of 16 February 1974 and during the next day. He left her house about 9:30 p.m. on 16 February and did not say where he was going.

Mrs. Theola Fay King testified that she is the mother of Thomas King and wife of Joseph King. Joseph had been drinking since Thursday and was intoxicated when Mrs. King went to work Saturday morning, 16 February 1974. Joseph was wearing dark blue trousers and a dark blue shirt. When Mrs. King returned from shopping between 6:00 and 7:00 p.m., Joseph was home alone and was still intoxicated. She read between 7:00 and 10:30 p.m. and then went to bed. Sometime that night she heard noises from inside the building as if someone had fallen, but she did not get up. When she awoke the next morning about 6:30 or 7:00 a.m., she saw her husband on the couch wearing the same clothes and in the same condition as the night before. There were two or three wine bottles around him. The end table near the couch was out of place but she did not notice anything else. She saw

her son in bed in the bedroom, and he complained that he had stayed there for the night because he had no oil at his house and because of his father's condition he did not want to bring his wife and children there. If Thomas was drinking when Mrs. King saw him, she could not tell it. Thomas was wearing burgundy pants, a T-shirt, and jacket, and she noticed no stains on his clothing. Thomas told his mother that he and his father had had a scuffle the night before. In her opinion, when she went to bed about 10:00 or 10:30 the night before, her husband was not able to go anywhere by himself.

Mrs. King further testified that a light blue pair of pants was in her clothes hamper on 17 February 1974 when she put other clothes there but she did not know how long the pants had been there. She noticed that the blue pants had a stain somewhere on the front. She stated that her son Timothy owns these blue pants and that, in her opinion, Thomas could not wear them. She also testified that these pants had been in the hamper since sometime in January 1974.

Timothy Eugene King, brother of Thomas and son of Joseph, testified that he owned the jacket found on the couch and the pair of light blue pants found in the hamper. His blood type is "O", and the stains on both articles of clothing were there when he last saw them in January 1974. The stains were the result of work-related injuries that caused him to bleed and of a blow which he received in the mouth during a fight at which he was a bystander. He further testified that the pants fit him but are too small for his brother Thomas.

On rebuttal the State offered testimony that police officers discovered the blue pants in evidence during the search of the Joseph King residence on 19 February 1974 in a laundry hamper in the bathroom. Analysis of a stain on the right leg of these pants revealed the presence of blood, group "O". Thomas King's blood was found to be group "A".

Attorney General RUFUS L. EDMISTEN, Assistant Attorney General THOMAS B. WOOD and Associate Attorney ARCHIE W. ANDERS for the State.

FRANK PATTON COOKE for Thomas Lee King, defendant appellant.

ROBERT H. FORBES for Joseph King, defendant appellant.

MOORE, Justice.

Joseph King moved for a separate trial and assigns as error the denial of his motion. These defendants were charged in separate bills of indictment with identical crimes. The offenses charged are of the same class, relate to the same crimes and are so connected in time and place that most of the evidence at the trial on one of the indictments would be competent and admissible at the trial on the others. Each defendant relied on an alibi as a defense and their defenses were not antagonistic. Under such circumstances, the trial judge was authorized by G.S. 15-152 (repealed by Sess. Laws 1973, c. 1286, s. 26, effective July 1, 1975) in his discretion to order their consolidation for trial. State v. Bass, 280 N.C. 435, 186 S.E. 2d 384 (1972); State v. Turner, 268 N.C. 225, 150 S.E. 2d 406 (1966); State v. Hamilton, 264 N.C. 277, 141 S.E. 2d 506 (1965); State v. Morrow, 262 N.C. 592, 138 S.E. 2d 245 (1964).

No statement made by either defendant was admitted which tended to incriminate or prejudice the other defendant. Hence, the rule as set out in Bruton v. United States, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), as applied in State v. Fox, 274 N.C. 277, 163 S.E. 2d 492 (1968), does not apply.

Defendant further contends, however, that the action of Judge Hasty in consolidating the cases for trial was void because it overruled a prior order entered by Judge Grist, and that one superior court judge cannot overrule an order entered by another superior court judge. It should first be noted that the order of Judge Grist to which defendant refers was entered at a hearing held for the purpose

of setting bond. Their hearing was held on 13 June 1974 and after hearing a number of witnesses, Judge Crist entered an order denying the motion for allowance of bond for each defendant. He then added that the cases were held for further consideration, and

> "That the State has indicated that [it] will probably not proceed in both cases at the same term and counsel for the defendant, Joe King, Mr. Robert H. Forbis, has indicated he would likewise move that the matters not be consolidated for trial...
>
> "It further appearing to the Court that the cases were calendared for trial during the week of June 10, 1974, and that the defendants were ready for trial and that it became necessary that the State move for a continuance because of the absence of private prosecution, Mr. Grady B. Stott, and the Court having considered the motion for a bond as a further motion for a speedy trial;
>
> "The Court orders that the State be required to elect as to which case it desires to try and that said case be placed on the calendar for trial in Custer County on July 2?, 1974." (Emphasis added.)

At the hearing before Judge Crist on 13 June 1974, no motion for a severance was pending. Such motion was not made until 8 July 1974. Judge Crist never considered this motion, and his order of 13 June only referred to future probabilities. Therefore, Judge Nagy did not overrule Judge Crist. This contention is without merit.

The cases were properly consolidated for trial and the foregoing assignment of error is overruled.

Defendants next contend that the trial court erred in allowing the State to introduce evidence against defendants regarding extraction of blood and hair samples from them and the comparison of blood from defendants and Missouri Davis with exhibits introduced into evidence by the State. Defendants contend that there was no factual basis for allowing these blood samples to be drawn and hair samples taken. There is no merit in this contention.

When the State moved to require defendants to submit to the extraction of blood samples and to furnish hair samples, Judge Nagy, after hearing evidence and arguments of counsel, made findings of fact fully supported by the evidence as follows:

"(1) On [illegible] February 197[illegible], the dead body of [illegible] Davis was found [illegible] at his home in [illegible] County. [illegible] determined that [illegible] had sustained multiple head wounds.

"(2) Mrs. Davis advised the investigating officers that two subjects assaulted her and her husband in their home, that one wore a head covering of some type, that one used a hammer as a weapon, that in a struggle with one of the persons she hit him with the hammer.

"(3) Investigating officers found a toboggan-style cap in the Davis home with hair inside it. Mrs. Davis has advised investigating officers that the cap was not her property or her husband's.

"(4) Investigating officers found a claw-type hammer lying under a truck one-half block from the Davis home. There appeared to be dried blood on the hammer.

"(5) Mrs. Davis, who is still in the hospital as a result of her injuries, has made a photographic identification of the defendants as the persons who assaulted her and her husband.

"(6) On [illegible] February 197[illegible], investigating officers under authority of a search warrant searched the home of the defendant, Joseph King, and seized clothing which appeared to be bloodstained. Apparent bloodstains were also found on the [illegible] in the home.

"(7) Donald Robinson, a cab driver for Yellow Cab Company, has informed investigating officers that early in the morning after this occurrence the defendant, Terry King, was a passenger in his cab and that the said defendant had apparent bloodstains on his clothing.

"(8) Blood samples from Mr. and Mrs. Davis have been obtained and sent to the State Bureau of Investigation for analysis.

"(9) Samples of stains on the hammer and clothing have been sent to the State Bureau of Investigation for analysis, and the bureau has advised investigating officers that the stains are blood.

"(10) The defendant, Joseph King, has stated to investigating officers that he received a [illegible] cut on his hand which resulted in the bloodstains to his clothing.

"(11) The defendants both appear to be healthy males, and there is no evidence that either suffers from any illness, disease, or physical disability which would make a reasonable withdrawal of blood deleterious to his health.

"(12) That it is reasonably necessary for the State to secure hair samples and bloodstain samples from the defendants and that they will be of material aid in determining whether the defendants committed the offense charged.'

case [illegible] findings, Judge [illegible] properly ordered the blood samples taken [illegible].

Defendants' counsel [illegible] that their constitutional rights were not violated by the involuntary withdrawal of blood or taking of hair samples, citing [illegible] v. [illegible], [illegible] U.S. [illegible], [illegible] L. Ed. 2d [illegible] ([illegible]), and [illegible] Am. Jur. 2d, Criminal Law § 344 ([illegible]).

Defendants further contend, however, that defendants' counsel had a right to be present when the blood samples were taken, and for that reason they argue that the court erred in denying their motion to suppress all evidence having to do with their furnishing blood samples and the comparison of these samples with stains found on items of clothing and other objects at or around the scene of the crime and with the blood of the victims.

In denying this motion, Judge [illegible] found, as follows:

> (1) That counsel for the defendants were given sufficient notice, if they so desired, to be present when blood was extracted from their clients and a copy of said order was served on counsel on [illegible] February 197[illegible];
>
> (2) That counsel was not present during the taking of these samples on [illegible] February 1974;
>
> (3) That counsel at their request were furnished samples of the blood extracted from the defendants;
>
> (4) That while counsel addressed complaints to their clients at the hospital during the taking of the defendants' blood, they conceded that their primary objection was to their being compelled to furnish blood and the introduction of evidence based thereon;
>
> (5) That counsel were repeatedly told that they could have [illegible] blood tests [illegible] and [illegible]; and [illegible];
>
> (6) That the court indicated, should it be the request of defense counsel, that it would order the blood withdrawal procedure [illegible], and another [illegible] in their presence. No such request was made. (Emphasis added.)

Thus, counsel for defendants, by their failure to appear when the samples were taken and to request further blood tests, effectively waived their right to complain on appeal. Even without

such waiver their argument here would be unavailing, for as we said in State v. Wright, 274 N.C. 84, 90-91, 161 S.E. 2d 581, 587 (1968):

> "The authorities hold, however, that handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstrations, even the body itself, are identifying physical characteristics and outside the protection of the Fifth Amendment privilege against self-incrimination. Schmerber v. California, 384 U.S. 757, 16 L. ed. 2d 908, 86 S. Ct. 1826; Gilbert v. California, 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967); U. S. v. Wade, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967); State v. Garbill, 256 N.C. 652, 124 S.E. 2d 873; Annotation: Accused's Right to Counsel under the Federal Constitution, 18 L. ed. 2d 1428. Such pretrial police investigating procedures are not of such a nature as to constitute 'critical' stages at which the accused is entitled to the assistance of counsel guaranteed by the Sixth Amendment and made obligatory upon the states by the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 9 L. ed. 2d 799, 83 S. Ct. 792; Escobedo v. Illinois, 378 U.S. 478, 12 L. ed. 2d 977, 84 S. Ct. 1758; Pointer v. Texas, 380 U.S. 400, 13 L. ed. 2d 923, 85 S. Ct. 1065. . . ."

This assignment is overruled.

Defendants next contend that the trial judge erred in finding Bryan Stirball (in the field of blood typing), W. G. Layton, Jr. (in the field of fingerprint identification and comparison), Laura Ward (in the field of forensic serology), Dr. Eugene Rutland, Jr. (in the field of psychology), and Steve Jones (in the field of fingerprinting) to be experts in their respective fields and that, in announcing his findings in the presence of the jury, the judge expressed an opinion regarding the credibility of these witnesses contrary to G.S. 1-180.

Defendants further contend that the trial judge erred by reemphasizing these findings in his charge to the jury by stating that "an experienced fingerprint analyst of the North Carolina Bureau of Investigation and his supervisor" testified in behalf of the State. These contentions are without merit. Our cases have consistently held:

> "Whether the witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial judge. . . .

"A finding by the trial judge that the witness possesses the requisite skill will not be overturned on appeal unless there is no evidence to support it. . . ." 2 Stansbury's N. C. Evidence § 132 (Brandis Rev. 1973), and cases therein cited.

The evidence with respect to the qualifications of each witness fully supports the findings and it is quite obvious that the rulings finding those witnesses to be experts in their respective fields could not have been understood by the jury as anything other than rulings upon the qualifications of the witnesses to testify as to their opinions. ". . . It has never been the general practice in the courts of this State for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert. . . ." State v. Frazier, 280 N.C. 151, 157, 185 S.E. 2d 633, 637 (1971).

The statement in the charge to which defendant now objects was made by the trial judge in recapitulating the State's evidence and was amply supported by the testimony concerning the training and experience of those who were witnesses. If defendant at the time deemed this statement to be inaccurate, he should have called the error to the trial judge's attention then and there in order to give him opportunity to correct it. His failure to do so waived whatever error, if any, there might have been. State v. Henderson, 285 N.C. 1, 203 S.E. 2d 10 (1974); State v. Neal, 284 N.C. 670, 197 S.E. 2d 770 (1973); O'Berry v. Perry, 266 N.C. 77, 145 S.E. 2d 331 (1965); State v. Cornelius, 261 N.C. 451, 144 S.E. 2d 833 (1964); Steelman v. Penfield, 220 N.C. 693, 18 S.E. 2d 131 (1942); Manufacturing Co. v. R. R., 222 N.C. 731, 25 S.E. 2d 33 (1943). This assignment is overruled.

Defendant's ninth error is to the action of the trial court in admitting into evidence the harness found by officers some distance from the scene of the crime and at a later time, and in permitting the testimony by witnesses with relation thereto. The harness was found 311 feet from the defendant's home lying under a

dump truck at approximately 1:15 p.m. on 17 February 1974. Defendants contend that it was so remote from the commission of the crime both by distance and time that it was inadmissible.

Mrs. Davis testified that the hammer introduced into evidence was similar to the one with which Joe King hit her. Blood found on the hammer was group "O" as was the blood of Mrs. Davis.

Any object which has a relevant connection with the case is admissible in evidence and weapons may be admitted when there is evidence tending to show that they were used in the commission of the crime. 1 Stansbury's N. C. Evidence § 116 (Brandis Rev. 1973); State v. Patterson, 284 N.C. 190, 200 S.E. 2d 10 (1973); State v. Muse, 280 N.C. 31, 185 S.E. 2d 214 (1971); State v. Sneeden, 274 N.C. 498, 164 S.E. 2d 192 (1968). The testimony of Mrs. Davis that the hammer was similar to the one used to hit her was sufficient identification for the purpose of introducing it into evidence. State v. Bass, supra; State v. Patterson, supra; State v. Fox, 277 N.C. 1, 175 S.E. 2d 561 (1970); State v. Macklin, 210 N.C. 496, 187 S.E. 788 (1936).

The lapse of time occurring between the crime on 16 February and the discovery of the hammer nearby on 17 February was not a significantly long period. This lapse of time and the distance from the scene of the crime to where it was found would not render the evidence incompetent but would only affect its probative force. 22A C.J.S., Criminal Law § 712 (1961); State v. Brown, 280 N.C. 590, 187 S.E. 2d 85 (1972); State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938); State v. Macklin, supra. See State v. Woods, 286 N.C. 612, 213 S.E. 2d 214 (1975). This assignment is overruled.

Defendants next contend that the trial court erred in several instances in failing, upon general objection, to instruct the jury that certain evidence was to be considered against only one of the defendants and that such evidence was incompetent as to the other. Defendant Thomas King contends that it was error to fail

Bruton v. United States, supra; State v. Fox, 274 N.C. 277, 163 S.E. 2d 492 (1968). We are here presented with a different situation in which no statement of either defendant implicating the other was admitted in evidence. Here, on several occasions when defendants specifically objected and requested restrictive instructions, the trial judge, in an abundance of caution, gave such instructions. We cannot discern how the trial judge could on other occasions, upon general objections, understand that he was being asked to give restrictive instructions, especially when such evidence in no way implicated the objecting defendant. This assignment is overruled.

The trial judge instructed the jury: 'By law, any killing of a human being by a person committing or attempting to commit robbery with a dangerous weapon . . . is first degree murder, punishable by death.'

Defendants assign as error the failure of the trial judge to define the word 'attempted.' In State v. Coffin, 267 N.C. 210, 147 S.E. 2d 893 (1966), we said:

> ". . . It is not to be assumed that the jurors were ignorant and the words, 'annoy, molest and harass,' are in such general usage and so well understood by the average person that it would have been a waste of time to define them. Had the defendant thought their definition of sufficient importance to warrant it, it is quite likely that the court would have defined them but the failure to make such request waives any possible error. S. v. Caudle, 269 N.C. 249, 152 S.E. 2d 91; S. v. Kelly, 218 N.C. 610, 6 S.E. 2d 217."

And, in State v. McNeely, 244 N.C. 737, 94 S.E. 2d 853 (1956), we said:

> ". . . While the judge did not define in detail what is meant by 'an attempt to commit robbery,' the language used is accordant with ordinary meaning of the word attempt, and is clearly understandable. S. v. Jones, 227 N.C. 490, 42 S.E. 2d 465. . . ."

Under this same assignment defendants contend that the trial judge erred in his instruction to the jury regarding the evidence by failing to state all the evidence favorable to the defendants. G.S. 1-180 requires the trial judge to apply the law to the

various factual allegations presented by the evidence. State v. [illegible], [illegible] N.C. [illegible], [illegible] S.E. 2d [illegible] ([illegible]). The judge is not required to recapitulate all the evidence. He is only required to state the evidence necessary to explain the application of the law thereto. The general rule is that objections to the charge in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction. State v. Henderson, supra; State v. [illegible], supra. A party desiring further elaboration on a subordinate feature of a case must aptly tender request for further instructions. State v. [illegible], supra; State v. Cutler, [illegible] N.C. [illegible], [illegible] S.E. 2d [illegible] ([illegible]).

In the present case, to make sure that the jury understood that he was not summarizing all the evidence, the trial judge stated:

> "Members of the Jury, I did not attempt to recapitulate or summarize all of the evidence in the case. I only reviewed, as I recall, what certain of the evidence offered by the State and the defendant tends to show. You will note I use this phrase, 'tends to show'. I did this because what, if anything, the evidence does show, is for you as the jury to determine. I only referred to such of the evidence as I deemed necessary to explain and apply the law in the case. All of the evidence is before you and you are not to understand that I am emphasizing any part of the evidence over and against any other part of the evidence. All of the evidence is important and it is your duty to remember it all, consider it all and weigh it all in arriving at your verdicts in these cases. Therefore, if your recollection of what the evidence was differs from that of the District Attorney or counsel for the State and counsel for the defendants or even the Court says it was, you will rely and be governed entirely and solely upon your own recollection of what the evidence was in these cases."

An examination of the charge discloses that the judge complied with the statutory requirement of G.S. 1-180. This assignment of error is overruled.

An examination of the entire record discloses that defendant received a fair and fair trial, free from prejudicial error.

A TRUE COPY
ADRIAN J. NEWTON
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA

No Error.

Mrs. Peggy [illegible]
DEPUTY CLERK
[illegible] July [illegible] 75

SUPREME COURT OF NORTH CAROLINA

Spring Term 1975

STATE OF NORTH CAROLINA

v.

From Gaston

Thomas Lee King

ORDER FOR STAY OF EXECUTION

Petition having been filed by the defendant above named, through his attorney, Frank P. Cooke of Gastonia, North Carolina, for a stay of execution of the judgment and death sentence rendered by the Honorable Fred Hasty during the July 15,1974 criminal session of Gaston County Superior Court, which judgment upon appeal was affirmed by the Supreme Court of North Carolina in its opinion filed June 26, 1975, execution being scheduled on the third Friday following the filing of the opinion, which is July 11, 1975, and the defendant, by his counsel, having stated his intention to file a petition for writ of certiorari in the United States Supreme Court;

NOW, THEREFORE, it is ordered that execution of the judgement be and the same is hereby stayed pending further orders of this court.

It is further ordered that the defendant remain in the custody of the Director of the Department of Correction pending further orders of this court.

It is further ordered that a certified copy of this order be served on the warden of Central Prison, Raleigh, North Carolina.

This the 10th day of July, 1975.

Susie Sharp

CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA.

Served by delivering a certified copy of this order to Mr. Sam Garrison, Warden of Central Prison, at Raleigh, North Carolina at 4:35 P.M. this 10th day of July, 1975.

Raymond K. Taylor
MARSHAL, SUPREME COURT OF NORTH CAROLINA

cc: The Honorable James E. Holshouser, Jr.

Mr. Frank Patton Cooke, Attorney at Law

Mr. Jacob L. Safron, Assistant Attorney General

A TRUE COPY
ADRIAN J. NEWTON
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA

BY _____
DEPUTY CLERK

Supreme Court of the United States

No. A-256 ~~October Term, 19~~

THOMAS LEE KING AND JOSEPH LEE KING,

Petitioners

v.

NORTH CAROLINA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 24, 1975

/S/ Warren E. Burger

Chief Justice of the United States.

Dated this 26

day of September, 1975

75-5792

IN THE

SUPREME COURT OF THE UNITED STATES

November Term, 1975

****

THOMAS LEE KING and JOSEPH LEE KING,
Petitioners,

v.

STATE OF NORTH CAROLINA,
Respondent.

****

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

RUFUS L. EDMISTEN
Attorney General of North Carolina

THOMAS B. WOOD
Assistant Attorney General

Counsel for the State of North Carolina, Respondent

NORTH CAROLINA DEPARTMENT OF JUSTICE
P. O. Box 25201
Raleigh, North Carolina 27611
Telephone: (919) 829-3316

Page

INDEX AND TABLE OF AUTHORITIES i

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF CASE 3

STATEMENT OF FACTS 4

ARGUMENT 4

CONCLUSION 5

EXHIBITS 7

I. Brief filed by State of North Carolina in the Supreme Court of the United States in Case entitled Kelly Dean Sparks, Petitioner, v. State of North Carolina, Respondent. No. 74-669 7

II. Brief of the State of North Carolina heretofore filed in the Supreme Court of North Carolina and reported in 287 NC 645 (1975) (State v. King) 8

CITATIONS

Cases:

Furman v. Georgia, 408 US 238 ..... 1 & 4

State v. Waddell 282 NC 431 194 SE 2d 19 (1973) 8

Kelly Dean Sparks v. State of North Carolina (Brief being considered by the Supreme Court of the United States and being designated by No. 74-669 4

IN THE

SUPREME COURT OF THE UNITED STATES

November Term, 1975

NO. 75-5792

THOMAS LEE KING and JOSEPH LEE KING,
Petitioners,

v.

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of North Carolina was rendered and filed in that Court on June 26, 1975, bearing Opinion No. 8 and is reported in 215 SE 2d 540. A copy of the opinion has, heretofore, been submitted to this Court by Petitioners.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I.

HAVE THE PETITIONERS BEEN DEPRIVED OF THEIR CONSTITUTIONAL RIGHT TO BE FREE FROM THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENTS, IN VIOLATION OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY VIRTUE OF THE SUPREME COURT OF NORTH CAROLINA'S INTERPRETATION OF SECTION 14-17 OF THE NORTH CAROLINA GENERAL STATUTES AFTER THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE CASE OF FURMAN v. GEORGIA, 408 US 238?

II.

HAVE THE PETITIONERS BEEN DEPRIVED OF THEIR CONSTITUTIONAL RIGHT TO BE FREE FROM THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENTS, IN VIOLATION OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY VIRTUE OF THEIR BEING SENTENCED TO DEATH UNDER THE NORTH CAROLINA GENERAL STATUTES SECTION 14-17?

III.

HAVE THE PETITIONERS BEEN DEPRIVED OF THEIR CONSTITUTIONAL RIGHT OF DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY VIRTUE OF THE CONSOLIDATION FOR TRIAL OF THE CHARGES AGAINST PETITIONER THOMAS LEE KING WITH THOSE AGAINST PETITIONER JOSEPH LEE KING?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT V.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VIII.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATUTORY PROVISIONS INVOLVED

I.

N.C.G.S. 14-17 prior to its Amendment, which was effective April 8, 1974:

Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony,

shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the Court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

II.

N.C.G.S. 15-152: (1965)

Separate counts; consolidation. - When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the Court will order them to be consolidated: Provided, that in such consolidating cases the defendant shall be taxed the solicitor's full fee for the first count, and a half fee for only one subsequent count upon which conviction is had or plea of guilty entered: Provided, this section shall not be construed to reduce the punishment or penalty for such offense or offenses.

STATEMENT OF CASE

The petitioners Thomas Lee King and Joseph Lee King were tried before The Honorable Fred H. Hasty and a jury at the July 15, 1974, Criminal Session of the Gaston County Superior Court Division of the General Court of Justice for the Twenty-Seventh Judicial District of North Carolina, upon indictments charging each of them with robbery with a dangerous weapon and first degree murder of Leo Davis, both offenses occurring on or about the 16th day of February, 1974. The Petitioners entered a plea of not guilty to each charge. The jury, on the 31st day of July, 1974, returned verdicts of guilty in all four cases. The Court sentenced both defendants to death by the inhalation of lethal gas in the cases against them charging them with first degree murder and imposed no judgment in the cases charging an armed robbery. Both defendants gave notice of appeal and the Supreme Court of North Carolina upheld the convictions.

STATEMENT OF FACTS

The respondent, State of North Carolina, agrees with those facts pertinent to these petitioners' rights to be adjudicated in the Supreme Court of the United States as set forth in that opinion of the Supreme Court of North Carolina which is appended to the petitioners' Petition for Writ of Certiorari and heretofore filed in this Court.

ARGUMENT

A. STATE'S RESPONSE TO ARGUMENTS NOS. I AND II RAISED BY PETITIONERS.

The petitioners raise the contention that their constitutional right to be free from the infliction of cruel and unusual punishments protected by the Eighth Amendment to the Constitution of the United States have been deprived by virtue of the Supreme Court of North Carolina's interpretation of Section 14-17 of the North Carolina General Statutes after the decision of the Supreme Court of the United States in the case of Furman v. Georgia, 408 US 238. Additionally, under their second question, the petitioners contend that their constitutional rights have been deprived by the denial of their freedom from the infliction of cruel and unusual punishments in violation of the Eighth Amendment to the Constitution of the United States by virtue of their being sentenced to death under North Carolina General Statutes Section 14-17.

The State of North Carolina, among other cases, has pending for consideration by the Supreme Court of the United States, its case of Kelly Dean Sparks v. State of North Carolina designated in this Court as 74-669. In that brief now before this Court, under that argument designated as No. III, there is discussed in detail the rationale of the decisions in this area by the Supreme Court of North Carolina and its power to perform what the petitioners call a legislative function in the striking out of a portion of a State Statute in conflict with the Furman (supra) opinion of this Court. Additionally, under that argument designated as No. III of the State of North Carolina's Sparks (supra) brief, there is a lengthy discussion of the death penalty, its application, and its cruel and unusual aspects. This brief and the arguments presented therein are attached hereto and specifically incorporated by the State of North Carolina as its response to those questions designated as No. I and No. II

as raised in this Court by the petitioners.

B. STATE'S RESPONSE TO ARGUMENT DESIGNATED NO. 3 BY PETITIONERS

The petitioners' third argument for the granting by this Court of their Petition focuses upon certain alleged prejudicies caused to their cases by virtue of their being forced to have their guilt or innocence adjudicated in a joint trial. The State of North Carolina, in opposition to this argument, would refer this Court to its response as contained in Argument I of its brief heretofore filed in the Supreme Court of North Carolina entitled State v. King, which Argument is hereby reaffirmed in the Supreme Court of the United States. The State's brief containing this response is attached hereto and made a part hereof.

CONCLUSION

The State of North Carolina, respondent, respectfully requests of this Court that it deny the petitioners' Petition for Writ of Certiorari to the Supreme Court of North Carolina.

This the 17 day of January, 1976.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Thomas B. Wood
Assistant Attorney General

ATTORNEY FOR RESPONDENT
North Carolina Department of Justice
P. O. Box 25201
Raleigh, North Carolina 27611
Telephone: (919) 829-3316

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an Assistant Attorney General licensed to practice law in the State of North Carolina and in the United States Supreme Court.

That on October 6, 1976, he served a copy of the attached RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA to the person hereinafter named, at the place and address stated below by depositing said envelope and its contents in the United States mails, postate prepaid, at Raleigh, North Carolina:

Mr. Frank Patton Cooke
Attorney at Law
Commercial Building
Gastonia, North Carolina 28052

This the 6th day of October, 1976.

Thomas B. Wood
Assistant Attorney General
North Carolina Department of Justice
P. O. Box 25201
Raleigh, North Carolina 27611
Telephone: (919) 829-3316

NO. 8 TWENTY-SEVENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1975

****

STATE OF NORTH CAROLINA	)	
	)	
v	)	From Gaston
	)	
THOMAS LEE KING AND JOSEPH KING	)	

****

BRIEF FOR THE STATE

****

QUESTIONS INVOLVED

I.

DID THE TRIAL COURT BELOW COMMIT PREJUDICIAL ERROR IN ORDERING THE CONSOLIDATION OF THE CHARGES AGAINST JOSEPH KING WITH THOSE OF THE DEFENDANT, THOMAS LEE KING?

II.

DID THE TRIAL COURT BELOW COMMIT PREJUDICIAL ERROR IN PERMITTING THE STATE TO EXTRACT BLOOD AND HAIR FROM THE DEFENDANTS, JOSEPH KING AND THOMAS LEE KING AND IN ADMITTING INTO EVIDENCE COMPARISONS OF SAID BLOOD AND HAIR WITH BLOOD ALLEGEDLY FOUND AT THE SCENE OF THE CRIME AND TESTIMONY WITH RELATION THERETO?

III.

DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN FINDING THE WITNESSES OFFERED BY THE STATE TO BE EXPERTS IN THEIR RESPECTIVE FIELDS IN THE PRESENCE OF THE JURY AND IN REFERRING TO THEM AS SUCH IN ITS CHARGE?

IV.

DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN ADMITTING INTO EVIDENCE A HAMMER FOUND BY OFFICERS SOME DISTANCE FROM THE SCENE OF THE CRIME AND AT A LATER TIME AND IN PERMITTING TESTIMONY BY WITNESSES WITH RELATION THERETO?

V.

DID THE TRIAL COURT BELOW COMMIT ERROR WHEN IT DID NOT RESTRICT THE ADMISSIBILITY OF EVIDENCE COMPETENT AGAINST ONE DEFENDANT BUT NOT THE OTHER DEFENDANT, AND BY ALLOWING INCOMPETENT EVIDENCE TO BE INTRODUCED?

VI.

DID THE TRIAL COURT COMMIT ERROR IN CHARGING THE JURY:

(a) THAT IT SHOULD CONSIDER THE CRIME OF ATTEMPTED ROBBERY IN DETERMINING THE GUILT OR INNOCENCE OF MURDER WITHOUT IN ANY WAY DEFINING THE CRIME OF ATTEMPTED ROBBERY?

(b) IN RECAPITULATING THE EVIDENCE IN SUCH A MANNER SO AS TO INDICATE A BELIEF IN THE VERACITY OF THE STATE'S CASE AND A DISBELIEF IN THE DEFENDANT'S CASE?

VII.

DID THE TRIAL COURT BELOW COMMIT PREJUDICIAL ERROR IN DENYING THE DEFENDANTS' MOTIONS FOR MISTRIAL, DISMISSAL, AND MOTIONS TO SET ASIDE THE VERDICTS?

STATEMENT OF THE CASE

This is a criminal action wherein the defendants, Thomas Lee King and Joseph King were charged in indictments with the crimes of robbery with a dangerous weapon and first degree murder of Leo Davis, both offenses occurring on or about the 16th day of February, 1974. The trial was held at the July 15, 1974 Criminal Session of the Gaston County Superior Court Division for the General Court of Justice for the 27th Judicial District before The Honorable Fred Hasty, Judge Presiding and a jury.

The defendants entered pleas of not guilty to each charge and the jury, on the 31st day of July, 1974, returned verdicts of guilty in all four cases. The Court sentenced each defendant to death by the inhalation of lethal gas in the cases against them charging them with first degree murder, and imposed no judgment in the cases of armed robbery. The defendants, thereupon, gave notice of appeal to the North Carolina Court of Appeals.

STATEMENT OF FACTS

The State would substantially agree with the facts as presented in the defendant-appellants' briefs and will, therefore, reiterate here only such facts as will be pertinent to its responses to the questions presented upon these appeals.

ARGUMENTS

I.

THE TRIAL COURT BELOW DID NOT COMMIT PREJUDICIAL ERROR IN ORDERING THE CONSOLIDATION OF THE CHARGES AGAINST JOSEPH KING WITH THOSE OF THE DEFENDANT, THOMAS LEE KING.

Assignments of Error Nos. 1 (R p 609); 6 (R p 610); 82 (R p 615); 93 (R p 616); 94 (R p 616); 109 (R p 618); 111 (R p 619); 84 (R p 615)

Exceptions Nos. 1 (R p 2); 6 (R p 51); 82 (Rpp 315-316); 84 (R p 499); 93 (R p 519); 94 (R p 315); 109 (R p 519); 111 (R p 575)

IV.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMITTING INTO EVIDENCE A HAMMER FOUND BY OFFICERS SOME DISTANCE FROM THE SCENE OF THE CRIME AND AT A LATER TIME AND IN PERMITTING TESTIMONY BY WITNESSES WITH RELATION THERETO.

Assignments of Error Nos. 8, 12, & 13 (R p 611); 9 (R p 611); 74 (R p 614); 82 & 83 (R p 615);
Exception Nos. 8 & 9 (R p 125); 12 & 13 (R p 137); 74 (R p 256); 82 & 83 (R p 256)

The State will initially respond to the defendants' contentions that the trial Court committed prejudicial error when it overruled Judge Grist's previous Order consolidating the trial of the cases against the co-defendants, father and son.

This response can be more effectively made by excerpting the previous Order issued by Judge Grist and the pertinent findings promulgated by him that formed its content. At page 27 of the record wherein certain portions of the Court's Order are set forth, we find the following:

> "That the matter is ordered held for further consideration in the event that the cases are unable to be heard as hereafter set forth."
>
> "That the State has indicated that there will probably not proceed in both cases at the same term and counsel for the defendant, Joe King, Mr. Robert H. Forbes, has indicated he would likewise move that the matters not be consolidated for trial."
>
> "The Court orders that the State be required to elect as to which case it desires to try and that said case be placed on the calendar for trial in Gaston County on July 15, 1974."

A reading of the entire Order indicates:

(1) That the Court understood that the State had determined that it wanted to proceed against each defendant separately; and

(2) To clarify which case was to be tried first, the Court ordered that the State be required to elect which case it desired to try.

Effectively, therefore, the Court's Order did not affirmatively state that the defendants should be tried separately, but only that if, (as was their announced intention), the State decided to proceed separately against each defendant, it should elect what case it decided to try first. The earlier Order rendered by Judge Grist, contained nothing that would not be consonant with a discretionary Order by a succeeding Judge presiding in the case that allowed the consolidation of the two cases. This view is clearly supported when it is considered that the State cured the indecision to which the original Order was addressed by moving that the four cases against the two defendants be consolidated for trial.

When the Order of Judge Grist is considered in its proper context, such Order did not recognize the need for separate trials as the defendants contend, but plainly was an attempt by the Court to provide what it supposed both the State and the defendants had openly desired - separate trials for each defendant. In this regard, the Court must have been mistaken for the State later moved for consolidation of the cases and the succeeding Judge cleared up this misinterpretation by allowing the State's motion. In summary, therefore, the Order by Judge Grist would seem to be an effort on his part to clear up the question as to who was to be tried first rather than an Order speaking against the consolidation of the trials.

Although involving a factually dissimilar situation, a basically similar principle was involved and condoned by the Supreme Court of North Carolina in the case of Alexander v. Brown, 236 NC 212, 72 SE 2d 522. In that case, it was stated by the Court that, when it is impossible to tell whether an Order striking certain paragraphs of a complaint was based on irrelevancy or improper reference to another paragraph, another Superior Court Judge may allow an amendment setting out the same facts in full instead of by reference, the matter being relevant. 2 Strong, N. C. Index 2d, Criminal Law, Sec. 9 at page 448. The argument could be advanced, based upon the reasoning in this case, that Judge Hasty was simply modifying an earlier interlocutory Order upon the emergence of changed circumstances (i.e. subsequent wish of the State to consolidate the cases for trial) as was approved in Calloway v. Ford Motor Company, 281 NC 296, 189 SE 2d 484.

The defendants make the further arguments:

(1) That they were undifferentiated during the trial and that evidence inadmissible as to one and applicable only to the other was heedlessly admitted.

(2) That because they were father and son, they were unnecessarily tied together in both name and guilt in the minds of the jury;

(3) That the identification by the victim, Missouri Davis, of the tatoos on the hand of Joseph King, the dark blood-stained coat he wore found in the Joseph King home, the hammer identified only in the hands of Joseph King and the scratches and bruises found on him prejudiced his co-defendant, Thomas Lee King, against whom such evidence would not be admissible. In this regard, the defendants further complained that the remoteness of the location of a hammer that was found from the crime scene and the time sequence as to when it was found and its identification made its admission prejudicial.

The State would respond to these arguments by averring to the fact that the interests of the two defendants, father and son, were not antagonistic to each other. Certainly, neither defendant made a statement inculpatory of the other. And, if it be considered that there was insufficient evidence to convict one of the defendants, such acquittal would not more strongly implicate the other. Further, the introduction of the evidence of the coat, and the headpiece containing hair and blood and other evidence which connected the defendant, Joseph King, to the crime could not have prejudiced his co-defendant, Thomas Lee King, when the care that the presiding Judge took in assuring that the jury understood that separate defendants were on trial and that separate issues of guilt were involved is considered. In this regard, let us examine the Court's charge at page 520 of the record:

> "Members of the Jury, as you are aware, we have, for the past two weeks and two days been hearing four criminal cases which were consolidated for the purpose of trial. It now becomes my duty to charge you with instructions with which you are to be guided in arriving at your verdicts in these cases.
>
> In two of the cases, the defendant, Thomas Lee King, is charged in Bills of Indictment charging him with Robbery with a Dangerous Weapon and Murder in the First Degree. These cases are numbered 74 CR 4355 and 74 CR 4357, respectively. In the other two cases, the defendant, Joseph King, is likewise charged in Bills of Indictment with Robbery with a Dangerous Weapon and Murder in the First Degree. These cases are number 74 CR 4356 and 74 CR 4358, respectively. Each of the defendants pleads not guilty to each of the charges lodged against him, as well as any lesser offenses included therein. Upon their pleas of not guilty, there arises in behalf of each of them a presumption of innocence of all charges included in the Bills of Indictment and places upon the State of North Carolina the burden of proof. The measure of proof is beyond a reasonable doubt.
>
> This means that the defendants and each of them come into court presumed to be innocent of all charges and this presumption of innocence remains with each of them until the State proves his guilt beyond a reasonable doubt."

The care that the trial Court exercised in his preliminary instructions in assuring that the jury considered the separate offenses charged against each defendant and the evidence applicable thereto was further emphasized by the Court when it continued this separation in the jurors' minds by carefully detailing the separate offenses alleged to have been committed and their possible verdicts upon each offense as to each defendant. (R pp 521 and 522)

the conduct of the trial did the father or son affirmatively attempt to discredit or implicate his co-defendant then on trial. Separate evidence, therefore, which could conceivably be relevant only to one of the co-defendants, considering this background, could not have prejudiced either of the defendants on trial.

The State would, further, argue that, even if it be found that the co-defendants, Thomas Lee King and his father were slightly prejudiced by the introduction of evidence concerning the other, there was more than sufficient additional evidence directly tying each defendant to the crime to overcome any prejudice to their cases. As to both defendants' guilt, the record reveals:

(1) That the victim, Leo Davis, died from manual strangulation from a young man identified by an eyewitness as Thomas Lee King - (R p 54);

(2) That the wife of the deceased, who was herself attacked, recognized both of the defendants and later identified them in photographs as two persons coming to her well-lighted home on the night of the offense - (R p 59);

(3) That this victim-eyewitness saw Thomas Lee King choking her husband as she herself, was being dragged away and beat over the head with a hammer by Joseph King - (R p 67);

(4) That the victim-eyewitness recognized both Thomas Lee King and his father at the scene of the crime and identified them in photographs - (R p 112);

(5) That Thomas Lee King had on light blue or gray trousers (R p 90) which corresponded to the testimony of the cabdriver who picked up an individual fitting Thomas Lee King's description on the night in question (i.e. that his young passenger was wearing light blue clothing with a big patch of blood on the leg) - (R p 113);

(6) That Joseph King arrived with a knitted cap on his head and was dressed in dark or blue clothes similar to the blue jacket found on his premises - (R p 234);

(7) That the fingerprints found on a metal cashbox at the crime scene were identical to the fingerprints of the defendant, Thomas Lee King - (R p 244);

(8) That a Yellow cabdriver that picked individuals up fitting the description of the defendant and his father heard the younger passenger call the elder something like "Pappy". - (R p 114);

(9) That besides the patch of blood that he noticed on the younger passenger sitting on the front seat, he noticed that the older gentleman seated in the back had his head and face scratched up and bloody - (R p 114);

(10) That the jacket discovered at the defendant, Joseph King's, home had type "O" blood on it which matched the victim, Missouri Davis's blood type and was totally dissimilar to both his and his son's type "A" blood. And, that further, the handle of the hammer received into evidence and the right leg of the blue pants further introduced, each contained type "O" human blood - (R pp 253-277).

The separation of the evidence and cases by the Court in its charge and the identification in every instance of each portion of the evidence with the particular co-defendant involved would amply provide adequate safeguards to each of these non-antagonistic co-defendants. Additionally, in this regard it should be noted that neither defendant requested the Court to charge the jury to consider such evidence unrelated to himself, only for purposes for which it was competent. 1 Stansbury's, North Carolina Evidence, Brandis Revision, Sec. 79, pp. 240-241.

Examining all of the evidence from a different approach, it could be argued with some merit that each co-defendant, based upon the overwhelming direct and circumstantial evidence contained in the record, acted in concert by attacking both occupants in the house simultaneously - one with a hammer and the other through manual strangulation of the husband - attacks that the injured wife witnessed. Evidence, therefore, concerning each individual would have bearing on the guilt of the other participant in the common crime wherein they assisted each other.

The argument that the location of the hammer and the time lapse that had transpired when it was found rendered such evidence too remote to be admissible is untenable. See State v. Battle, 4 NC App 588, 167 SE 2d 476 (knife found eight days after incident occurred). And, the fact that a witness testified that the hammer was "similar" to the one used against her in the assault did not render such evidence inadmissible. See State v. Bass, 280 NC 435, 186 SE 2d 384 (witness testified that a jacket admitted into evidence was "similar" to a coat worn by defendant when he raped her). See also State v. Jarrett, 271 NC 576, 157 SE 2d 4, cert. den. 389 U.S. 865, 19 L.Ed. 2d 135, 88 S. Ct. 128.

II.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR WHEN IT PERMITTED THE STATE TO EXTRACT BLOOD AND HAIR FROM THE DEFENDANTS AND ADMIT INTO EVIDENCE COMPARISONS OF SAID BLOOD AND HAIR WITH BLOOD ALLEGEDLY FOUND AT THE SCENE OF THE CRIME AND TESTIMONY WITH RELATION THERETO.

Assignment of Error Nos. 2 (R p 609); 3, 4, & 5 (R p 610); 9 & 10 (R p 611); 16, 17, 18, 19, 20, 21, 22 (R p 611); 26, 27, & 28 (R p 610); 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 39, 40, 41, 42, 43, 44,

45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, (Rp 612); 56, 57, 58, 59, 60, 61, 64 (R p 613); 73, 74, 75, 76, 77, 78, 79, 80 (R p 614); 84, 85, 86, 87, 88, 89, 90, 91 (R p 615); 92 (R p 616); 99, 101, 102, 103, 104, 105 (R p 617); 110 (R p 618)

Exceptions Nos. 2 (R p 16); 3, 4, & 5 (R p 36); 9 (R p 125); 16, 17 (R p 167); 18, 19, 20 (R pp 133; 168); 21 & 22 (R pp 139; 169); 26, 27, 28, 29, 30, 31, 32 (R pp 175; 176; 168-169; 174-175); 33, 34, 35, 36 (R pp 175-181; 177); 37, 38, 39, 40, 41, 42, 43 (R p 178); 44, 45, 46 (R p 179); 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 (R pp 178; 179; 180; 181; 182; 184; 225-226); 64 (R p 233); 73, 74, 75, 76, 77, 78, 79, 80 (R pp 254, 256, 273, 275, 276); 84 (R p 256); 85, 86, 87, 88, 89, 90 (R pp 272; 273; 275; 504); 91 & 92 (R p 276); 99 (R p 501); 101, 102, 103, 104, 105 (R p 504); 110 (R p 519)

The defendants advance the argument under these assignments of error that there was no factual basis for an Order allowing their blood to be withdrawn and hair samples to be taken. It is their contention, (particularly in the argument of the co-defendant, Thomas Lee King), that the exhibits involving blood as adduced from the testimony would not necessarily involve both defendants and, therefore, there was no foundation for the Court's Order allowing blood and hair to be taken from them at the hospital.

The State will respond to these defendants' contentions by first averring to the fact that there was an ample foundation laid by the presiding Judge to justify his Order requiring that the blood and hair samples be taken from the defendants. At pages 13-16 of the record, we have the Court's findings based upon the evidence that:

(1) The assaulted wife of the victim was found to be bleeding profusely as a result of an attack in her home by one of two men who used a hammer;

(2) That a claw hammer containing bloodstains was found relatively near the scene the next day;

(3) That a cabdriver picked up the defendant, Tommy King, on the night in question who had apparent bloodstains on his clothing; that investigating officers found a toboggan-styled cap in the victim's home with hair inside it which was not the property of the victim;

(4) That under authority of a search warrant, officers searched the home of the defendant, Joseph King, and seized clothing which appeared to be bloodstained;

(5) That bloodstains from the clothing taken in a valid search of Joseph King's home and the bloodstained hammer found near the crime scene along with blood samples from the victim have been sent to the State Bureau of Investigation for analysis;

(6) That in order to make a proper blood and hair comparison to determine the defendants' complicity or lack of complicity in the crime, such samples would be necessarily required from the defendants for analysis.

Certainly, it could not be argued that, considering this broad enumeration by the presiding Judge, that, as to both defendants, it was not necessary, and firmly founded in the evidence, that the co-defendants should be required to submit to the taking of blood and hair samples. Especially, would this examination seem necessary considering the fact that the defendants, by their pleas of not guilty, are controverting every fact in issue including the origin of the blood testified to as having been found on various items of clothing found in the defendant's home and on objects located in and around the crime scene.

The defendants concede that the authorities hold that a defendant's constitutional rights are not violated by the involuntary withdrawal of blood and the presentation of evidence in relation thereto. See State v. Cash, 219 NC 818, 151 SE 2d 277 (1941); 21 Am. Jur. 2d 389, Criminal Law, Sec. 364. See also State v. Bryant, 5 NC App 21 at page 29; 21 Am. Jur. 2d, Criminal Law, Sec. 364, page 389.

The second branch of the defendants objections hereunder relate to their complaint concerning the fact that they were not represented by counsel during the medical procedure at the hospital concerning the removal of hair particles and blood samples from their persons - all in violation of their constitutional rights. The State does not feel a necessity to answer this contention by citing those cases wherein blood or fluid was taken from a defendant when he was unconscious or did not know why he was asked to give such a sample. (Being obvious instances wherein those defendants could not have been represented by counsel.) See State v. Diguid, 50 Ariz. 276, 72 P. 2d 435; Davis v. State, 189 Md. 640, 57 A. 2d 289. It is strongly argued by the State that counsel effectively waived such defects as was emphasized by the Court in its findings at pages 32-36 of the record. The defendants, through counsel, made a motion to suppress all evidence having to do with

their furnishing blood samples for comparison with stains found on items of clothing and, other objects in and around the crime scene and the blood of the victim. As a foundation for his Order, the presiding Judge found:

> *(1) That counsel for the defendants were specifically allowed, if they so desired, to be present when blood was extracted from their clients and a copy of said Order was served on counsel on February 28, 1974; (R p 33)*
>
> *(2) That counsel was not present during the taking of these samples on February 28, 1974; (R p 33)*
>
> *(3) That counsel at their request were furnished samples of the tests conducted at the hospital; (R p 33)*
>
> *(4) That while counsel addressed complaints to their absence at the hospital during the taking of the defendants' blood, they conceded that their serious objection was to their being compelled to furnish blood and the introduction of evidence based thereon; (R p 34)*
>
> *(5) Counsel were repeatedly told that they could have all blood tests results when received and were or would be furnished same; (R p 35) and most importantly*
>
> *(6) That the Court indicated, should it be the request of defense counsel, that it would order the blood withdrawing procedure disregarded, and another one staged in their presence. No such request was made. (Therefore, quite justifiably, upon these detailed findings, the defendants' motions to suppress were denied.)*

The State can add nothing to the findings of implied waiver by counsel for the defendants to be present at the hospital during the blood and hair extractions as were so clearly set forth by Judge Hasty. It should be mentioned, however, that the record does not reveal that the attorneys for the defendants ever affirmatively requested to be present at the hospital during the extractions.

The defendant, Joseph King's, contention that the Court did not hear evidence as to the lawfulness of the search and seizure of the blood-stained clothing from his home and that the Court failed to make findings of fact thereon when he objected to the search is untenable. The Court, clearly allowed a direct examination by Mr. Forbes of the issuing Magistrate concerning the affidavit upon which he issued a search warrant. The Magistrate actually read the affidavit into the record (R pp 170-173) and was cross-examined by the State (R p 173). The Court, thereafter, did not reiterate the statements contained in the affidavit which had just been read in his findings supporting the Magistrate's issuance of a search warrant, but clearly incorporated it as part of the record (R pp 174-175).

This incorporation clearly formed a sufficient foundation for the Court's finding of probable cause for the issuance of the warrant. See State v. Jackson, 18 NC App 234, 196 SE 2d 568.

III.

THE TRIAL COURT BELOW DID NOT COMMIT PREJUDICIAL ERROR WHEN IT FOUND THE WITNESSES OFFERED BY THE STATE TO BE EXPERTS IN THEIR RESPECTIVE FIELDS IN THE PRESENCE OF THE JURY AND IN REFERRING TO THEM AS SUCH IN HIS CHARGE.

Assignments of Error Nos. 7 (R p 610); 56 (R p 613); 65 (R p 613); 66, 67, 68 (R p 613); 73, 75, & 79 (R p 614); 81, 89, 90, & 91 (R p 615); 96 (R p 616); 113 (R p 618)

Exceptions Nos. 7 (R p 53); 56 (R p 209); 65 (R p 242); 66, 67, & 68 (R pp 243-244); 73 (R p 254); 75 (R p 256); 79 (R p 275); 81 (R p 254); 89, 90, 91 (R pp 508-509); 96 (R p 526); 113 (R p 526)

The defendants contend that the trial Court committed prejudicial error, when, in the presence of the jury, it declared certain witnesses for the State to be experts following a detailed summary of their qualifications. The defendants admit that the case of Speitzman Company v. Williamson, 12 NC App 297 at page 305 held against him. In that case, the Court found that a determination by the trial Court in the presence of the jury that a defendant's witness was an expert would not be prejudicial error where the witness was not a party to the litigation. The Court made a finding that a securities expert, who qualified as an expert, was not prejudicially found to be such by the Court in the presence of the jury. The Court went on to say that such qualification was entirely dissimilar to the situation wherein a surgeon, who was a defendant in a malpractice suit, was found to be an expert witness on his own behalf. As is evident from the record, the witnesses who were found to be experts in their fields in the present case were, likewise, not parties to the litigation.

The defendants, however, do not stop at this juncture in their arguments but, rather, proceed to say that, cumulatively, prejudicial error was committed by the trial Court when it is considered that the Court qualified witnesses as experts during the course of their examination and further mentioned in his charge that an experienced fingerprint analyst and his supervisor had testified for the State. The defendants contend that the

mention of the State's expert witness in its charge brought the present case within the precepts of State v. Melton, 11 NC App 180, 180 Se 2d 476 (1971), wherein the Superior Court, in two portions of its charge, made reference to the fact that he had found a fingerprint analyst to be an expert.

The State would respond to this further argument by averring to the fact that, at no point in his charge, did the trial Court in the present case mention that he himself had found a State's witness to be a fingerprint expert. The Court's only reference to this aspect of the case was a reference to the fact that an experienced fingerprint analyst and his supervisor had testified for the State. In Melton (supra), there were two definitive statements by the trial Court that he had found a State's witness to be an expert. Additionally, it should be mentioned that in Melton (supra), the Court of Appeals of North Carolina acknowledged that the State's entire case would rise and fall upon the validity of the State's fingerprint testimony and, therefore, the Court's expression of any opinion that might lend credence to this testimony would be damaging. In the present case, however, there was other clear and convincing evidence that pointed to the defendants' guilt. Apart from evidence concerning defendants' fingerprints, we have the eyewitness account of one of the victims who was brutally attacked at the death scene.

ARGUMENT

V.

THE TRIAL COURT COMMITTED NO ERROR BY NOT RESTRICTING THE ADMISSIBILITY OF CERTAIN EVIDENCE TO JOSEPH KING.

Assignment of Error Nos. 7, 9 (R p 581); 10 (R p 582); 12 (R p 589); 15 (R pp 590-591); 10 (R pp 582-588); 21 (R p 593); 25 (R pp 594-596)
8, 10, 11 (R p 611); 15, 16, 17 (R p 612); 22, 24 (R p 613); 25 (R pp 613-614); 28-31 (R pp 614-615); 32, 33, 36, 37 (R p 615).

Exception Nos. 11 (R p 133); 22 (R p 174); 23, 24, 25 (R p 175); 64, 65, 66 (R p 184); 69.70, 71 (R p 225); 72 (R pp 225-226); 73, 74 (R p 226); 26 (R p 175); 27-32 (R p 176); 33, 34, 36 (R p 177); 37-43 (R p 178); 44-47 (R p 179); 48-53 (R p 180); 54-58 (R p 181); 59 (R p 182); 84 (R p 594); 88 (R pp 273-274); 89, 90 (R p 274); 91 (R pp 274-275); 92 (R p 275)
8 (R p 72); 10 (R p 126); 11-19 (R pp 126-128); 15 (R pp 174-175); 33-44 (R pp 175-182); 45-52 (R pp 182-183); 64 (R p 233); 66-68 (R pp 243-244); 66-68 (R pp 243-244); 69-70 (R pp 249-250); 74-80 (R pp 256, 273, 275, 276); 81 (R p 307); 82 (R pp 316); 85-88 (R p 504); 89-91 (R pp 508-509).

Argument I of this brief is hereby incorporated by reference in response to Argument V of the Appellants' Briefs. In addition, it is significant to note several additional points.

With reference to the identification by Missouri Davis of the blue coat allegedly worn by Joseph King on the night in issue, the question was answered prior to an objection being interposed by defense counsel. An objection to an answer responsive to a question comes too late when the witness has answered the question. State v. Wilson, 280 NC 674 (1972). Generally, an objection is waived unless it is made at the proper time. State v. Blalock, 9 NC App 94 (1970) cert. denied 401 US 712. In such a situation, a motion to strike would be addressed to the discretion of the trial court. State v. Perry, 275 NC 565 (1969); State v. Walsh, 19 NC App 420 (1973). It is significant to note that the record does not reveal any motion to strike this evidence.

Considering the above rules, it is apparent that the trial court did not err in stating that the witness's answer was already in evidence when defense counsel requested a voir dire examination. A motion to strike, instead of a voir dire examination, would have been appropriate at this point. Of course, such motion would have been addressed to the discretion of the trial judge. Perry, supra.

The Court correctly instructed the jury that it was not to consider the evidence of Charles Bell and J. W. Wells as to defendant Thomas King as that evidence related to those policemen's actions in searching

the residence of Joseph King. The search was made pursuant to a search warrant for that residence and Thomas King did not reside there. Thus, the actions of these police officers pursuant to the warrant clearly should not have been admissible against Thomas King. Even if such evidence should have been admissible against Thomas King, it certainly was not prejudicial to him.

According to the record, no motion to strike was made as to the evidence of Martin Barlow relating to his receipt of the coat found during the search of Joseph King's home and its delivery to the SBI. Also, the record reveals no motion to strike the evidence of Vance Furr relating to the receipt of the coat and its delivery to the SBI. According to State v. Battle, 267 NC 513 (1966) a motion to strike would have been necessary to preserve an exception to the admission of the evidence.

With regard to the defendant's contention that certain evidence should have been limited in its admissibility to Joseph King, the Court should have noted that the record reveals no request for such instructions. The general rule is that a request must be made in such a situation:

> "...as a general rule, the incompetency of the evidence for one purpose will not affect its admissibility for other and proper purposes. The evidence will be admitted, and the party against whom it is offered will be entitled, on request to have the jury instructed to consider it only for the purposes for which it is competent." 1 Stansbury's North Carolina Evidence, Brandis Revision, § 79, pp 240-241. (Emphasis added.)

The Appellants rely upon State v. Franklin, 248 NC 695 (1958) in their contention that a request for such instructions was not necessary. However, Franklin, supra, stands for the principle that where evidence is admissible against one party and not for any purpose against another, a general objection made by the latter would be sufficient. State v. Kelly, 19 NC App 60 (1973). In the present case, however, a situation is presented that is not similar to the circumstances contained in Franklin, supra. We must consider here that the two defendants acted in concert when they attacked both the husband and wife simultaneously. Therefore, evidence directly concerning one defendant would have bearing upon the guilt of the other defendant as proving their coordinated wrongful action.

As to the validity of the search warrant, the trial court made findings and conclusions (R pp 174-175). The findings of the trial judge when supported by competent evidence are binding and conclusive in appellate courts. State v. Stepney, 280 NC 306 (1972). In addition, it is

apparent that the search warrant was sufficient to satisfy the requirements of N.C.G.S. § 15-26. Thus, the search warrant was valid and was properly concluded to be so by the trial judge.

VI.

(A)

THE TRIAL COURT DID NOT ERR BY NOT DEFINING THE WORD "ATTEMPT" IN ITS INSTRUCTIONS.

Assignment of Error Nos. 49 and 50 (R pp 607-608).

Exception Nos. 123 (R p 547) and 124 (R p 548)

The Appellant contends that the trial court erred by failing to define the word "attempt" when referring to attempted robbery in its instructions. It is not error for the court to fail to define and explain words of common usuage and meaning to the general public in the absence of a request for special instructions. State v. Patton, 18 NC App 266 (1973). This rule applies equally to essential elements of the crime charged as well as to other legal terms contained in the charges. Patton, supra. See also State v. Godwin, 267 NC 216 (1966). The specific issue raised by the Appellant in this case was answered in State v. McNeely, 244 NC 737 (1956). The Court in McNeely, supra, held that the word "attempt" is self-explanatory and that the Court is not required to define it.

It is important to note that the record does not reveal any objection or exception by defendant Joseph King. Thus, any objection would have been waived. Blalock, supra; State v. Davis and State v. Fish, 284 NC 713 (1974).

(B)

THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS REGARDING THE EVIDENCE.

Assignment of Error Nos. 53 and 54 (R p 609)
40, 41 (R p 616); 42 (R pp 616-617); 43 (R p 617); 53 (R p 617); 54 (R pp 617-618); 55 (R p 618).

Exception Nos. 127 (R p 556); and 128 (R p 557)
94, 95 (R pp 521, 522); 96 (R p 526); 97, 98 (R pp 536-540); 99 (R p 540); 112, 113, 114 (R p 557).

N.C.G.S.§1-180 requires the trial judge to apply the law to the various factual situations presented by conflicting evidence. State v. Keziah, 279 NC 681 (1967). The Court is not required to recapitulate all the evidence in instructing the jury. The requirement of N.C.G.S.§1-180

is that the judge shall state the evidence necessary to explain the application of the law thereto. This requirement shall be met by recapitulating the main points of the evidence relied upon by each side. State v. Noell, 284 NC 670 (1974). The general rule, as stated in State v. Henderson, 285 NC 1 (1974), is that objections to the charge in stating the contentions of the parties must be called to the Court's attention in apt time to provide an opportunity for correction. See Noell, supra; State v. Guffey, 265 NC 331 (1965). The complaints of the appellants fall within the general rule which requires counsel for appellants to bring their objections to the charge to the Court's attention in apt time. The record does not reveal that the appellants' counsel brought such an objection to the Court's attention in apt time. Clearly, a complete reading of the charge shows that it was not weighed in favor of the State or that the alleged inconsistency or incorrectness of the charge in issue amounted to an expression of opinion by the trial judge in violation of N.C.G.S. §1-180.

In addition, it is significant to note that the trial court charged as follows:

> "Members of the Jury, I did not attempt to recapitulate or summarize all of the evidence in the cases. I only reviewed, as I recalled, what certain of the evidence offered by the State and the defendants tends to show. You will note I use this phrase, 'tends to show'. I did this because what, if anything, the evidence does show, is for you as the jury to determine. I only referred to such of the evidence as I deemed necessary to explain and apply the law in the cases. All of the evidence is before you and you are not to understand that I am emphasizing any part of the evidence over and against any other part of the evidence. All of the evidence is important and it is your duty to remember it all, consider it all and weigh it all in arriving at your verdicts in these cases. Therefore, if your recollection of what the evidence was differs from that of the District Attorney or counsel for the State and counsel for the defendants or even the Court says it was, you will rely and be governed entirely and solely upon your own recollection of what the evidence was in these cases." R p 538

It is apparent that the trial judge did not violate N.C.G.S. §1-180 in its instructions regarding the evidence. Instead, the trial judge clearly emphasized that the jury was to rely entirely on its own recollection of the evidence.

In addition, the Appellants contend that the trial court erred by referring to the defendants as "Joe" and "Tommy" in its instructions. The record clearly indicates that witnesses referred to the defendants as

"Tommy" and "Joe". Thus, it was certainly proper for the Court to so refer to the defendants in recapitulating the evidence of both the State and the defendants.

Also, the Appellants contend that the following paragraph was included in what appeared to be a statement of contentions of Thomas Lee King:

> "At 10:30 p.m. on February 18, 1974, at the Charlotte Hospital, she was shown several folders of photographs. In viewing the first folder, she picked out Thomas Lee King as being the younger man." R p 528

This was a portion of the evidence resulting from cross-examination of Missouri Davis, a witness for the State, by counsel for Thomas Lee King. This was clearly pointed out by the judge in his instructions. (R p 527)

ARGUMENT

VII.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANTS' MOTIONS TO SET ASIDE THE VERDICT AND THEIR MOTIONS FOR MISTRIAL.

Assignments of Error No. 55 (R p 609)
33, 35 (R p 615); 39 (R p 616); 52 (R p 618).

Exception Nos. 129 (R p 575)
82 (R p 316); 84 (R p 499); 93 (R p 519); 111 (R p 575).

For the reasons stated in the preceding arguments, it is apparent that the trial court did not err in denying the defendants' motions for a mistrial and their motions to set aside the verdict.

CONCLUSION

It is respectfully submitted that, by reason of the matters and things set forth above, the trial Court did not commit reversible error. The cause, therefore, should not be reversed and the defendants should not be granted new trials.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Thomas B. Wood

Thomas B. Wood
Assistant Attorney General
N. C. Department of Justice
P. O. Box 25201
Raleigh, North Carolina 27611
Telephone: (919) 829-3316

Archie W. Anders

Archie W. Anders
Associate Attorney General
N. C. Department of Justice
P. O. Box 25201
Raleigh, North Carolina 27611

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for the State was served on the defendants by mailing copies thereof, postage prepaid, to their attorneys, the Honorable Frank Patton Cooke, 195 West Main Avenue, P. O. Box 1885, Gastonia, N. C. 28052 and the Honorable Robert H. Forbes, P. O. Box 2162, Gastonia, N. C. 28052.

This the 21st *day of* April, *1975.*

Thomas B. Wood

Thomas B. Wood

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 74-669

KELLY DEAN SPARKS,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUFUS L. EDMISTEN
Attorney General of
North Carolina

THOMAS B. WOOD
Assistant Attorney General

Counsel for the State of
North Carolina, Respondent

Department of Justice
Post Office Box 25201
Raleigh, North Carolina 27611
Telephone (919) 829-3316

INDEX

TABLE OF AUTHORITIES ii

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF CASE 5

STATEMENT OF FACTS 5

ARGUMENT 5

CONCLUSION 24

TABLE OF AUTHORITIES

Cases — Page

Federal

Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912) 23

Chambers v. Mississippi, 410 U.S. 284 (1973) 6

Coffey v. Harlan County, 204 U.S. 659 (1907) 23

Furman v. Georgia, 408 U.S. 238 (1972) 4,9,10 12,13,14 15,18,19

Gideon v. Wainwright, 372 U.S. 335 (1963) 7

Johnson v. New Jersey, 384 U.S. 719 (1966) 15

Powell v. Texas, 392 U.S. 514 (1968) 17

Robinson v. California, 370 U.S. 660 (1962) 17

Speiser v. Randall, 357 U.S. 513 (1958) 9

Ex Parte United States, 242 U.S. 27 (1916) 23

United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) . . . 17

Williams v. Georgia, 349 U.S. 375 (1954) 6

Re Winship,
397 U.S. 358 (1970) 9

Witherspoon v. Illinois,
391 U.S. 510 (1968) 2,6,7

State

Lawton v. Steele,
119 N.Y. 226,
23 N.E '878 (1890), aff'd.
152 U.S. 133 (1894) 23

State v. Brewer,
258 N.C. 533,
129 S.E. 2d 262 (1963) appeal
dismissed 375 U.S. 9 (1963) 23

State v. Currie,
7 N.C. App. 439,
173 S.E. 2d 49 (1970) 8

State v. Drake,
8 N.C. App. 214
174 S.E. 2d 132 (1970) 8

State v. Fowler,
285 N.C. 90 (1974) 7

State v. Jarrette,
284 N.C. 625
202 S.E. 2d 721 (1974) 15,16,17

State v. Sanders,
276 N.C. 598
174 S.E. 2d 487 (1970) 8

State v. Waddell,
282 N.C. 431
194 S.E. 2d 19 (1973). 5,9,10,11
12,14,15
17,18,19

Federal Constitution

U. S. Constitition, Art. 4, §4 3

U. S. Constitution, Amendment V 3,22,23

U. S. Constitution, Amendment VIII . . . 2,3,9 16,19,22

U. S. Constitution, Amendment X 4,22

U. S. Constitution, Amendment XIV . . . 2,4,5,9 16,17,22

Federal Statute

28 U.S.C. §1257 (3) 1

State Constitution

North Carolina Constitution, Art. 1, §19, 22 & 27 22

North Carolina Constitution Art 11, §2 23

State Statutes

N. C. Gen. Stat. §4-1 11

N. C. Gen. Stat. §14-17 4

Other Authorities

21 Am. Jur. 2d, *Criminal Law* §14 (1965) 23

3 ENCYCLOPEDIA BRITANNICA (1st Ed. 1771) 3

II Pound, JURISPRUDENCE 317 (1959). . 20

III Pound, JURISPRUDENCE 238 (1959) . 21

III Pound, JURISPRUDENCE 235 (1959) . 21

III Pound, JURISPRUDENCE 264 (1959) . 21,22

RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged 1966) 3

1 Strong's, N.C. Index 2d (1967). 6

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 74-669

KELLY DEAN SPARKS,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

From a verdict of guilty of first degree murder and the imposition of a sentence of death entered by the Guilford County Superior Court in October of 1973, the defendant perfected a direct appeal to the North Carolina Supreme Court. That Court found no error, and upheld the sentence of the Superior Court. The opinion of the Supreme Court of North Carolina is found in its reports at 285 N.C. 631.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I.

WHETHER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT A TRANSCRIPT BE MADE OF THE *VOIR DIRE* EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE, SO AS TO ASSURE A RECORD OF SUFFICIENT COMPLETENESS TO PRESERVE THE DEFENDANT'S RIGHTS AGAINST UNCONSTUTUTIONAL METHODS OF JURY SELECTION, AS MANDATED BY *WITHERSPOON v. ILLINOIS*, 391 U.S. 510 (1968).

II.

WHETHER THE RIGHTS OF A CRIMINAL DEFENDANT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY AND TO HAVE THE BURDEN UPON THE STATE TO PROVE ALL ELEMENTS OF THE CASE BEYOND A REASONABLE DOUBT ARE VIOLATED BY INSTRUCTIONS THAT (a) A KILLING IS PRESUMPTIVELY UNLAWFUL AND DONE WITH MALICE WHEN A DEADLY WEAPON IS INTENTIONALLY USED, AND (b) THE BURDEN OF PROOF IS ON THE DEFENDANT TO SATISFY THE JURY THAT THERE WAS NO MALICE ON HIS PART, SO AS TO REDUCE THE CRIME TO VOLUNTARY MANSLAUGHTER.

III.

WHETHER IMPOSITION AND CARRYING OUT OF A SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AMENDMENT OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONSTITUTION

ARTICLE 4, SECTION 4.

"The United States shall guarantee to every state in this union a republican form of government . . . ."

("Republic, commonwealth, a popular state or government; or a nation where the people have the government in their own hands." Vol. III ENCYCLOPEDIA BRITANNICA A DICTIONARY OF ARTS AND SCIENCES, 548, 1st Ed. (1771))

("republic, n. number 1. A state in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen . . . by them." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged, 1218 (1966))

AMENDMENT V.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VIII.

"Excessive bail shall not be required, nor excessive

fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT X.

"The powers not delegated to the U.S. by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

AMENDMENT XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL STATUTES OF NORTH CAROLINA

N.C.G.S. 14-17

Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: *Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the Court shall so instruct the jury.*• All other kinds of murder shall be deemed

---

• Subsequent to this Court's decision in *Furman*, the North

murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

STATEMENT OF CASE

The petitioner was tried upon a bill of indictment charging him with the murder of George L. Lashley, the Chief of Police of Gibsonville, North Carolina. He was tried by a Judge and a jury in the Guilford County Superior Court at Greensboro, North Carolina, during the October 29, 1973 session of Court. The jury found the defendant guilty of murder in the first degree and the Superior Court entered its judgment condemning the defendant to death. The judgment of the lower court was affirmed by the Supreme Court of North Carolina on appeal.

STATEMENT OF FACTS

The respondent, State of North Carolina, agrees with those facts pertinent to this petitioner's rights to be adjudicated in the Supreme Court of the United States as set forth in that opinion of the North Carolina Supreme Court which is appended as Appendix "A" to the petitioner's Petition for Writ of Certiorari and heretofore filed in this Court.

ARGUMENT

I

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT A TRANSCRIPT BE MADE OF THE *VOIR DIRE* EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE, SO AS TO ASSURE A RECORD OF

Carolina Supreme Court in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973) declared the portions set forth in italics above unconstitutional.

SUFFICIENT COMPLETENESS TO PRESERVE THE DEFENDANT'S RIGHTS AGAINST UNCONSTITUTIONAL METHODS OF JURY SELECTION AS MANDATED BY *WITHERSPOON V. ILLINOIS*, 391 U.S. 510 (1968).

Constitutional due process does not require the State to furnish a transcript of the *voir dire* examination of the jury when defendant has not requested such a transcript.

Petitioner Sparks claims that constitutional due process requires that the State furnish a transcript of the *voir dire* examination of prospective trial jurors in a capital case even in the absence of a request. This question is not properly before the Court, because, for all that appears in the record, the question is raised for the first time in the Petition for Certiorari. The question was neither raised in nor passed upon by the Supreme Court of North Carolina, nor does it appear in the record that a request was made to the trial court that a transcript be made and made available to the petitioner.

As this Court said in *Williams v. Georgia*, 349 U.S. 375, 382 (1954),

> "A state procedural rule which forbids the raising of a federal question at late stages of the case, or by any other than a prescribed method, has been recognized as a valid exercise of State power"

See also, *Chambers v. Mississippi*, 410 U.S. 284, at 308 et. seq. (1973) (opinion of Rehnquist, J.).

The rule of appellate practice in North Carolina is to the effect that the:

> "Supreme Court will not decide questions which have not been presented or adjudicated in the court below, especially questions relating to the constitutionality of a statute or an act of Congress". 1 *Strong's N. C. Index 2d*, p. 106 (1967), and cases there cited.

There is a second reason that this Court should not grant certiorari to question No. 1 raised by the petitioner, Sparks,

as to the requirement of a transcript of the *voir dire* examination of jurors. It is not the practice in North Carolina to make a transcript of the *voir dire* examination of jurors unless the transcript is requested by the defendant. But if such transcript is requested, it is granted as a matter of course. *State v. Fowler*, 285 N.C. 90, 103-107 (1974).

The Supreme Court of North Carolina in the *Fowler* case said, 285 N. C. at 107:

> "It is the primary duty of defense counsel to prepare and docket a true and adequate transcript of the record in the case on appeal in a criminal case. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Roux*, 263 N.C. 149, 139 S.E. 2d 189 (1964); G.S. 15-180; G.S. 1-282. It is also the duty of the solicitor to scrutinize the copy that the appellant serves upon him. If it contains errors or ommissions, it is the solicitor's responsibility to file exceptions or countercase. *State v. Fox, supra*. If, as in the present, defense counsel desires to take exception to the act of the Court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the *voir dire* examination as to that juror in the case on appeal. He should not take exception to his own failure to prepare and docket a true and adequate transcript of the record in the case on appeal. Such action is not approved."

The principle underlying the right to counsel case, *Gideon v. Wainwright*, 372 U.S. 335 (1963), is that the criminal defendant should have at his disposal a trained advocate who knows the law and is able to adequately preserve his rights. All that has happened in this case is that Sparks' counsel failed to request that a transcript of the *voir dire* examination be made and failed to put a transcript of that *voir dire* examination into the record. In no sense of the word has the State of North Carolina *denied* this petitioner a transcript of the *voir dire* examination of jurors in his case in order that he might preserve his rights under *Witherspoon v. Illinois, supra*.

II

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE RIGHTS OF A CRIMINAL DEFENDANT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY AND TO HAVE THE BURDEN UPON THE STATE TO PROVE ALL ELEMENTS OF THE CASE BEYOND A REASONABLE DOUBT ARE VIOLATED BY INSTRUCTIONS THAT (a) A KILLING IS PRESUMPTIVELY UNLAWFUL AND DONE WITH MALICE WHEN A DEADLY WEAPON IS INTENTIONALLY USED, AND (b) THE BURDEN OF PROOF IS ON THE DEFENDANT TO SATISFY THE JURY THAT THERE WAS NO MALICE ON HIS PART, SO AS TO REDUCE THE CRIME TO VOLUNTARY MANSLAUGHTER.

The State of North Carolina will substantially ratify the arguments presented by it in the Supreme Court of North Carolina and as contained in its brief filed in that Court. In its brief, the State advocated the position that the North Carolina rule substantially places the burden of proving the existence of malice upon the State and absolves the State of this burden only in extreme circumstances. Thus, the State could prove that a defendant: (1) used a deadly weapon; (2) pointed at the deceased; (3) fired the fatal shot, and still it would be charged with the burden of proving that such acts were accomplished intentionally. In effect, therefore, it would not be until the state also proved that the defendant intentionally used a deadly weapon that the burden of proof of a lack of malice toward the deceased would arise and shift to the defendant. The burden of such proof remains with the State and shifts only after additional proof of an intentional killing is established. It must be advocated that the shifting of the burden of proof to the defendant to disprove that he maliciously killed his victim, when these extreme circumstances are all proven, would be desirable. Especially would this be so when it is considered that evidence in mitigation would be more readily available to the defendant. See *State v. Drake*, 8 N.C. App. 214, 174 S.E. 2d 132 (1970); *State v. Currie*, 7 N.C. App. 439, 173 S.E. 2d 49 (1970); *State v. Sanders*,

276 N.C. 598, 174 S.E. 2d 487 (1970).

It is therefore, strongly argued by the State of North Carolina that its rule with regard to the burden of proof in a homicide case does not run counter to the holdings of *Re Winship*, 397 U.S. 358 (1970) and *Speiser v. Randall*, 357 U.S. 513 (1958). Rather, such rule is consonant with these holdings considering the fact that the initial burden of proof in such cases remains with the State.

III

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER IMPOSITION AND CARRYING OUT OF A SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AMENDMENT OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. *The mere existence of prosecutorial discretion, plea bargaining, the absolute requirement for the imposition of the death penalty upon capital offense convictions, and executive clemency do not bring a mandatory death penalty statute within the prohibitions of the Furman decision.*

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed. 2d 346, the Supreme Court of the United States held that the Eighth and Fourteenth Amendments to the Constitution of the United States forbid a state to inflict the penalty of death if, under the law of the state, either the jury or the judge is permitted, as a matter of discretion to choose between the imposition of the death penalty and the imposition of the penalty of imprisonment. The North Carolina Supreme Court case of *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, 23 (1973) was decided by that Court with knowledge of this Court's holding in *Furman* and decreed that the portion

of N.C.G.S. 14-17 which allows the jury the discretion (upon their guilty verdict of first degree murder) to recommend life imprisonment, invalidated only the discretionary portion of the statute and that (prospectively from the January 18, 1973 date of the *Waddell* decision) the North Carolina law would require that the court must pronounce a sentence of death upon every guilty verdict for any of the four capital offenses in North Carolina. The *Waddell* case was tried in the Superior Court of North Carolina prior to the *Furman* decision, and Waddell was sentenced to death. It was the first case to reach the North Carolina Supreme Court subsequent to *Furman*. The North Carolina Supreme Court then applied this court's *Furman* decision to Waddell and ordered his death sentence vacated and that he be sentenced to life imprisonment, 282 N.C. at 447 (North Carolina Supreme Court Reports).

The North Carolina Supreme Court further declared unconstitutional the following provisions of North Carolina General Statutes 14-17 (murder); 14-21 (rape); 14-52 (burglary); and 14-58 (arson):

> "Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

For the reasons set forth in its opinion, our court demonstrated that the proviso clause was clearly severable from the clause setting forth the punishment as established by the North Carolina General Assembly. See *Waddell*, 282 N.C. at pages 441-445.

The *Waddell* decision thus left death as the only permissible punishment in North Carolina for the crimes of first degree murder, rape, burglary and arson. The North Carolina Constitution of 1970 specifically provided for such punishment.

Our court in *Waddell* went even further to protect the constitutional rights of its citizens against *ex post facto* laws, for at 282 N.C. at page 446, of that opinion it *held*:

"North Carolina's mandatory death penalty for

> rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed *prior to the date of this decision but shall be applied to any offense committed after such date*. (Emphasis added)."

The North Carolina General Assembly has consistently decreed the death penalty for first degree murder and rape for nearly two hundred years and has recently reaffirmed that policy.

In 1778, the State of North Carolina enacted what is now codified as G.S. 4-1 which states:

> "All such parts of the common law as were heretofore in force and use within this State, or so much of the Common Law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

As both murder and rape were capital felonies under the common law, they became so in North Carolina in 1778. Thus death has been the punishment for murder in the first degree and rape in North Carolina for nearly two hundred years. *Waddell, supra*, at 441.

It was in 1949 that our present statutes providing for punishment in capital cases were amended. Prior to that time the punishment was death.

The amendments to each of our capital punishment statutes added the proviso which (1) empowered the *jury in its discretion* to recommend and thus to fix the punishment at life imprisonment, and (2) required the trial judge to so instruct the jury. *Waddell, supra*, at 441.

The question which the North Carolina Supreme Court was confronted with was:

"Does the remainder of G.S. 14-21 stand alone with death as the mandatory punishment for rape; or, is the proviso such a constituent and inherent part of a single statutory scheme of punishment that it is inseverable and the entire statute must fall?"

It was the sole duty and responsibility of our Supreme Court to answer that question. Justice Lake, speaking in a concurring opinion in *Waddell*, summed up that duty as concisely as can be done at 282 N.C. 448 and 449. He said:

"The Supreme Court of the United States being the higher authority on the validity of judgments under the Consitution of the United States, its mandates, issued in reliance upon *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, vacating the death sentences previously affirmed by this Court in the five cases cited in the opinion of Justice Huskins, became the law of those five cases. Under the compulsion of those mandates, this Court remanded those cases to the respective superior courts for the imposition of sentences of life imprisonment.

The present case, on the contrary, is before us for the first time. In it we have no mandate from the Supreme Court of the United States vacating the death sentence imposed upon this defendant. In the absence thereof, it is our duty, not that of the Legislature, to determine just what the United States Supreme Court decided in *Furman v. Georgia, supra*, and to determine the present state of the law of North Carolina with reference to punishment for the crime of rape in the light of that decision.

Only this Court can determine whether any portion of G.S. 14-21 is the law of North Carolina today and, if so, which portion. The Legislature, now in session, cannot make that determination. The Legislature can determine what the law of this State ought to be and shall be in the future. That is policy making and that is the Legislature's

prerogative and responsibility. It is for us, and for us alone, to determine what part of G.S. 14-21, if any, is the law of North Carolina today and determinative of the validity of the sentence from which this defendant appeals. That is not policy making but the interpretation of the statute - an exercise of the judicial function which we may not abdicate or assign to the Legislature. Constitution of North Carolina, Art. 1, §6; Art. IV, §1.

It is quite clear, as the opinion of Justice Huskins plainly states, that it is for the Legislature, not for this Court, to determine the policy of this State as to what acts shall be deemed crimes and as to the punishment therefor; that is, to determine what punishment ought to be and shall be imposed for the offense of rape, hereinafter committed. Constitution of North Carolina, Art. I §6; Art. II, §1; Art. XI, §2. But the Legislature has spoken in G.S. 14-21 and, until it speaks again, it is the duty of this Court to determine what, if anything, remains of its pronouncement in G.S. 14-21 after the decision in *Furman v. Georgia, supra*. No officer or agency, save this Court, can make that determination.

...Whether a statute is separable or inseparable is a question of statutory interpretation. It is well settled that the interpretation of a state statute is a question to be determined by the supreme court of the state. The Supreme Court of the United States has repeatedly accepted as binding upon it the interpretation placed upon state statutes by the highest courts of such states.

Thus, the Supreme Court of the United States has not said, and may not properly determine that G.S. 14-21 is or is not separable. What it has said in *Furman v. Georgia, supra*, is that the discretion which the proviso in G.S. 14-21 undertook to vest in North Carolina juries cannot be conferred upon them consistently with the Fourteenth Amendment. It having so held, it is now the prerogative and duty

> of this Court, and this Court alone, to determine whether the proviso is severable from the original statute unto which the proviso was attached by amendment in 1949. Thus, it is the date of the decision of that question by this Court – today – not the date of the decision in *Furman v. Georgia, supra*, which fixes the offenses of rape for which a death sentence may be imposed without running afoul of the *ex post facto* principle."

The Supreme Court of North Carolina answered the question it was confronted with in *Waddell* as follows:

> "The original portion of G.S. 14-21 with its mandatory death penalty for rape stood alone and was given full effect by the courts of this State for a century prior to the enactment of the 1949 proviso. Grammatically, as well as historically, the two portions of the statute are distinct and separate and the constitutional invalidity of the added portion will not destroy the part which was in existence prior to the enactment of the unconstitutional portion. (282 N.C. at 442-443).
>
> • • • •
>
> In light of the authorities cited, we hold that the unconstitutional proviso in G.S. 14-21 is severable and the remainder of the statute with death as the mandatory punishment for rape remains in full force and effect. (282 N.C. at 444-445).
>
> • • • •
>
> We recognize that the Legislature, not the courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts. In view of the decision in *Furman*,

> the Legislature may wish to delete the unconstitutional proviso from G.S. 14-21 (rape), G.S. 14-17 (murder), G.S. 14-52 (burglary), and G.S. 14-58 (arson); or it may wish to rewrite these statutes altogether to give expression to what it conceives to be the public will. Meanwhile, we hold that the effect of the *Furman* decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge. (282 N.C. at 445).

In the application of its decision in *Waddell*, the North Carolina Supreme Court directed that the death penalty could not be imposed on any criminal whether tried or not for any capital offense committed at or before the time of the finding of its decision on January 18, 1973. (282 N.C. at 446). Compare *Johnson v. New Jersey*, 384 U.S. 719 (1966).

In *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), we have the first case to reach the Supreme Court of North Carolina for a crime committed subsequent to the *Waddell* decision. In the *Jarrette* case, the North Carolina Supreme Court was requested to reconsider its decision in *Waddell*. The court did and reaffirmed its decision, *id.* at page 654.

The Court noted in *Jarrette* at pages 654-655:

"The determination of what the statutes of this State mean, with reference to the punishment to be imposed for criminal offenses, is a question of State law and the determination thereof by this Court is authoritative. It is not a Federal question. *Adderly v. Florida*, 385 U.S. 39 . . . reh.den., 385 U.S. 1020; *Shuttlesworth v. Birmingham*, 382 U.S. 87. . . .

• • • •

The contention of (Jarrette) is that a state statute, which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape, be sentenced to death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

• • • •

This is, of course, a Federal question and our determination of it is subject to review by the Supreme Court of the United States, but we must make the initial determination and must do so in the light of decisions heretofore rendered by that Court."

The major questions that the defendant recites in his petition regarding the prohibitions against the existence of prosecutorial discretion, plea bargaining, jury discretion, arbitrariness of a mandatory death penalty, and executive clemency are, also, very clearly answered in the *Jarrette* case.

As our court noted in the *Jarrette* case, 284 N.C. at 656:

"Although the mere statement of these contentions, in clear and simple terms, seems sufficient to show their lack of substance, the seriousness with which they are advanced impels us to take note of them briefly."

The court then addressed itself to each of the contentions of Jarrette and its answers are set forth at 284 N.C. 656-666.

These are found in Petitioner Jarrette's petition (No. 73-6877), Appendix "A", 202 S.E. 2d 721 at pages 741-747 which has heretofore been filed in this court.

The respondent, State of North Carolina, is unable, after research, to improve upon the reasoning and line of authorities set forth in the *Jarrette* opinion as noted immediately above. Accordingly, respondent adopts that reasoning and line of authorities as its response in this Court to the petitioners' contentions.

Respondent stipulates that the Governor of North Carolina does have the power to grant pardons and clemency to prisoners in the State's prison, and affirmatively shows that this Court has held this to be an unreviewable power in the hands of the chief executive. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

Respondent stipulates that its District Attorneys have the duty to exercise their respective judgments as to what crime the State's evidence warrants prosecuting, but shows unto the Court this judgment is a prerequisite to the carrying out of his constitutional duty, but the District Attorney's judgment must be exercised in accordance with law.

Respondent stipulates that its juries must exercise their respective judgments as to what crime, if any, the State's evidence has convinced them beyond a reasonable doubt an accused has committed. The respondent shows unto the Court that this exercise of judgment is a prerequisite to the performance of its constitutional duty and must be done in accordance with law.

B. *The mandatory death penalty is neither arbitrary nor inconsistent with contemporary standards of decency.*

The proscription against cruel and unusual punishment is applicable to the States through the due process clause of the Fourteenth Amendment. *Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962). The North Carolina Supreme Court so held in *State v. Waddell*, 282 N.C. 431 at page 436, 194 S.E. 2d 19, 23 (1973).

Since the beginning of the United States as a separate nation two hundred years ago, death sentences have been administered by both the Federal and State governments for a variety of crimes. As the North Carolina Supreme Court noted in *Waddell, id.* at page 435:

> "Prior to the decision in *Furman v. Georgia* the United States Supreme Court implicitly approved or, albeit in dictum, expressly upheld the constitutionality of capital punishment in many cases, including *Wilkerson v. Utah*, 99 U.S. 130, 25 L.Ed. 345 (1879); *In re Kemmler*, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890); *Weems v. United States*, 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947); *Trop v. Dulles*, 356 U.S. 86, 2 L.Ed. 2d 630, 78 S.Ct. 590 (1958); *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968); *McGautha v. California*, 402 U.S. 183, 28 L.Ed. 2d 711, 91 S.Ct. 1454 (1971). Thus, since the ratification of the Eighth Amendment one hundred eighty-one years ago, no decision of the United States Supreme Court prior to *Furman* casts the slightest doubt on the constitutionality of capital punishment."

Nor is there reason to believe this Court now considers capital punishment to be cruel and unusual punishment, *per se*, within the meaning of the eighth amendment. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Justices of this Court went to some length to explain that they did not reach that question.

As the North Carolina Supreme Court noted in the *Waddell* case:

> "Mr. Justice Douglas . . . wrote . . . Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach . . . (282 N.C. at 437).
>
> Mr. Justice Stewart . . . expressed his views as follows . . . The constitutionality of capital

> punishment in the abstract is not . . . before us in (Furman) . . . (282 N.C. at p. 437-438).
>
> Mr. Justice White . . . depicts his views. (thusly) . . . 'I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment . . . '(282 N.C. at 438).
>
> Four members of the (U.S. Supreme) court dissented (in Furman). The position of the four dissenters is best summed up by Chief Justice Burger as follows: . . . . Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that punishment is barred for any particular class or classes of crimes . . . (282 N.C. at 439)."

Thus, our court having to apply this Court's *Furman* decision in *Waddell*, at 282 N.C. 439, held:

> "The foregoing quotations from the various separate opinions in *Furman* compel the conclusion that capital punishment has not been declared unconstitutional *per se*. Rather, the *Furman* decision holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion."

There can be no dispute that the federal government has no powers beyond those delegated to it in the Constitution. That is, it has only limited sovereignty.

This being so, then where does the remainder of the sovereign power lie? If the answer be "the people" then who has "the people" deemed should exercise the remaining powers of their sovereignty?

The State contends the answer is to be found in the tenth amendment to the Constitution.

It is the State's contention that two of the incidents of those sovereign powers reserved to the States is the power to define criminal conduct and provide for the punishment therefor within the State's territory, limited only by the prohibition against cruel and unusual punishment contained in the eighth amendment.

Roscoe Pound in Volume II, *Jurisprudence*, part 12, *Law and the State* at page 317 states:

> "As a legal conception, sovereignty seems to mean the aggregate of powers possessed by the ruler or the ruling organs of a politically organized society. Internal sovereignty, then, is the aggregate of the powers of internal control possessed by the ruling organs of the society by virtue of which it is paramount over all action within. According to Sir Frederick Pollock it is the capacity 'of making, declaring and amending the law . . . without reference to any other authority and without any legal limit to its own power.'

• • • •

> But the idea of sovereignty begins with Bodin. He defined the state (*republica*) as an association governed by the highest power (*suprema majestas*) as the 'highest power over citizens and subjects, free from laws' (*legibus soluta*). Its chief characteristic was the power to give law to all citizens.

• • • •

> At common law, social interests were largely secured by a doctrine that the king was *parens patriae*, father of his country. That is, he was the guardian of public and social interests of all kinds and hence his courts of law and of equity had a general superintendence of all matters where 'public rights' (i.e. social interests or public interests) might be jeopardized.

> Criminal law is the primary resource of the legal order for securing social interests immediately as

such. At common law, prosecutions were in the name of the king and under the control of the Attorney General to the extent of his authority to enter *nolle prosequi* . . . (Pound. III *Jurisprudence*, Part 14, Scope, *Subject Matter of Law*, at p. 264."

Pound further discusses *Interests* in Part 14 of Volume III, *Jurisprudence* at page 238, *et. seq.* He specifically discusses the interests of the state as a legal entity.

1. *Interests of the state as a juristic person.*

> No small part of international law is taken up with the interests of states which international law should secure against infringement by other states. Thus it has usually been said that the absolute or natural rights of states, meaning the interests which it is held should be secured, are: (1) The right of self-preservation and independence. This is analogous to the so-called natural rights of physical integrity and personal liberty ascribed to the individual. It is analogous to an individual interest of personality. (and) (2) The right of exclusive legislation and jurisdiction within its territory. This, too, is an interest of personality. It is an interest akin to the interest of the individual in being allowed to manage his own affairs freely. Juristically, it is secured as a liberty...."

As the tenth amendment is directed toward maintaining the class of interests referred to by Pound as "public interests", *id.* (Vol. III at page 235), the United States of America is equally obligated to protect the State of North Carolina's exercise of its sovereign rights as it is to protect any other constitutionally protected right whether it be individual or State.

This Court, even if it desired to do so, would not abrogate a constitutionally guaranteed right of a State nor would it abrogate such rights of an individual. Thus

"contemporary standards" of "society" cannot be a proper basis for abolishing the death penalty under the Eighth Amendment any more than the "contemporary standards" of the McCarthy era could abolish the rights guaranteed to the individual under the Fifth Amendment to the Constitution.

Only by the exercise of the sovereign power of the State through its legislature should the punishment for murder or rape be lessened in North Carolina.

No other body of men and women on the face of this earth should be lawfully entitled to exercise that governmental power other than the people of North Carolina, either directly in revolution or by vote on a new constitution.

In summarizing its argument, the State of North Carolina would aver that the petitioner is effectively requesting that this court construe the Eighth Amendment in such a manner as to nullify express provisions of the Fifth and Fourteenth Amendments, and deny to the states the power to prescribe and impose appropriate punishment for capital crimes. The petitioner is therefore requesting that this court nullify in reality, the power of the people as a republic, acting through their elected representatives, to establish appropriate punishments for crime. The respondent contends that to do this, the Court would be placing an unwarranted restriction on Article IV of the Tenth Amendment to the Constitution of the United States as well as nullifying express provisions of the Fifth and Fourteenth Amendments.

The lawmakers and law enforcers have an affirmative constitutional duty to ensure domestic tranquility. This is the office of the criminal justice system. (See Pound, III, *Jurisprudence*; Chapter 4, *Interest*, Section 92 at p. 264, (1959)). The limitations placed upon them by both the Federal and North Carolina Constitutions, are that "cruel and unusual" punishment shall not be afflicted. (See U.S. Constitution, Amendment VIII.) Neither life nor liberty shall be taken except by due process of law; nor shall any person be denied equal protection of the law. (See U.S. Constitution, Amendments V, VIII, XIV, and Article I, Sections 19, 22 and 27, North Carolina Constitution.) Operating within these limitations, it is State Legislatures' inherent and exclusive duty and it has the

correlative right to define crime and provide for the punishment of crimes committed. (See *Ex Parte U.S.*, 242 U.S. 27 (1916); *State v. Brewer*, 258 N.C. 533, 129 S.E. 2d 262 (1963) app. dismd., 375 U.S. 9 (1963); *Lawton v. Steele*, 119 N.Y. 226, 23 N.E. 878 (1890), aff'd. 152 U.S. 133 (1894).

And it has also been observed that:

> "The power is exclusive and it is not shared by the Court. So long as the Constitutional prohibitions are not infringed, the will of the legislature in this respect is absolute."

(See 21 Am. Jur. 2nd *Criminal Law*, Section 14, p.95, citing among others, *Central Lumber Company v. South Dakota*, 226 U.S. 157 (1912), *Coffey v. Harlan County*, 204 U.S. 659 (1907)). It is the duty of the executive to bring to justice those who commit crimes and it is the duty of the judiciary to assure that the accused receives due process and equal protection of the law. Just as the Constitution of the United States contemplates capital punishment, so does the Constitution of North Carolina expressly provide therefor. (See U.S. Constitution, Amendment V.; N.C. Constitution, Article 11, Section 2.)

CONCLUSION

The State of North Carolina, respondent, respectfully requests of this Court that it deny the petitioner's Petition for Writ of Certiorari to the Supreme Court of North Carolina.

This the 11th day of February, 1975.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Thomas B. Wood

Thomas B. Wood
Assistant Attorney General
N. C. Department of Justice
Post Office Box 25201
Raleigh, North Carolina 27611
Telephone: (919) 829-3316

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an Assistant Attorney General licensed to practice law in the State of North Carolina and the United States Supreme Court.

That on February 7, 1975, he served a copy of the attached RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA to the person hereinafter named, at the place and address stated below by depositing said envelope and its content in the United States mail at Raleigh, North Carolina:

Address: Norman B. Smith
SMITH, CARRINGTON, PATTERSON, FOLLIN & CURTIS Attorneys at Law 704 Southeastern Building Greensboro, North Carolina 27401

Signed: Thomas B. Wood

Thomas B. Wood
Assistant Attorney General
N. C. Department of Justice
Post Office Box 25201
Raleigh, North Carolina 27611
Telephone: (919) 829-3316